(22,605)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 261.

LEM WOON, PLAINTIFF IN ERROR,

vs.

THE STATE OF OREGON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 25, 1912.

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1 & 2 In the Supreme Court of the United States.

LEM WOON, Plaintiff in Error,
vs.
STATE OF OREGON, Defendant in Error.

Appeal from the Supreme Court of the State of Oregon.

George J. Cameron, District Attorney; Joseph J. Fitzgerald, Deputy District Attorney, and Dan J. Malarkey, Attorneys for Defendant in Error:
Ralph E. Moody, John F. Logan, and Frank F. Freeman Attorneys for Plaintiff in Error.

3 Case No. 7173.

Drawer No. 716.

Transcript.

STATE OF OREGON, Plaintiff & Respondent,
vs.
LEM WOON, Defendant & Appellant.

Appeal from the Circuit Court, Multnomah County.

Before Honorable John S. Cleland, C. U. Gantenbein & Earl C. Bronaugh, Judges.

Dan J. Malarkey, Special Prosecutor & John W. Stevenson, Attorneys for Plaintiff & Respondent.
Frank Freeman, John F. Logan, Henry E. McGinn & R. E. Moody, Attorneys for Defendant & Appellant.

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Be it remembered, that heretofore on the 1st day of April, 1908, there was filed in the office of the Clerk of the Circuit Court of the State of Oregon for Multnomah County an True Information in words and figures as follows, to-wit:

In the Circuit Court of the State of Oregon for the County of Multnomah.

STATE OF OREGON
vs.
LEM WOON and YEE GUENG, Defendant-.

Lem Woon and Yee Gueng are accused by the District Attorney of the Fourth Judicial District of the State of Oregon, for the County of Multnomah, by this information, of the crime of murder in the first degree committed as follows:

The said Lem Woon and Yee Gueng on the 7th day of March, A. D., 1908, in the County of Multnomah and State of Oregon then and there being, did then and there unlawfully, purposely and feloniously and of their deliberate and premeditated malice, kill and murder one Lee Tai Hoy, by then and there unlawfully, purposely and feloniously and of their deliberate and premeditated malice, shooting him the said Lee Tai Hoy with a certain pistol which was then and there loaded and charged with gun powder and leaden bullets, by them and there unlawfully, purposely and feloniously and of the deliberate and premeditated malice of them, the said Lem Woon and Yee Gueng, pointing, aiming and discharging said pistol, so loaded as aforesaid, at, toward and against him, the said Lee Tai Hoy, then and thereby inflicting in and upon the body of him, the said Lee Tai Hoy, certain mortal wounds of which said mortal wounds he, the said Lee Tai Hoy, thereafter, to-wit: on the 7th day of March, A. D., 1908, died, and so in the manner and by the means aforesaid, they, the said Lem Woon and Yee Gueng unlawfully, purposely and feloniously, and of their deliberate and premeditated malice, killed and murdered him, the said Lee
6 Tai Hoy, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated at the City of Portland, in the county aforesaid, this 1st day of April, A. D. 1908.

Witnesses subpœnaed, sworn and examined before the District

Attorney for the State of Oregon. Fred J. Zeigler, Lee Long, Thomas Coleman, John H. Price, Lim Lung, Chin Ging Yuk, Carroll H. Tichenor, William Jones, Thomas Kay.

JOHN MANNING,
District Attorney,
By JOHN H. STEVENSON, *Deputy.*

A True Information,
JOHN MANNING,
District Attorney.

7 And Afterwards on Monday the 6th day of April, A. D. 1908, the same being the 1st judicial day of said term of said Court there was rendered and entered in said Court an Order in words and figures as follows, to-wit:

(Title.)

Now at this time comes the State of Oregon, by Bert E. Haney, Deputy District Attorney, and the defendants appearing in person in custody of the Sheriff and an Information having been heretofore to-wit: on the 1st day of April, 1908, duly presented to this Court by the District Attorney of the Fourth Judicial District of the State of Oregon, for Multnomah County, and filed with the Clerk charging said defendants with the crime of murder in the first degree, committed in said County and State on the 7th day of March, 1908.

Said defendants now duly arraigned by the District Attorney under the Court's direction, reading said Information and interpreted the same by an interpreter to the defendants, and delivering to said defendants a certified copy of said Information and the endorsements thereon, including the list of witnesses endorsed on said Information. The Defendants states that they are correctly named, and they are allowed until the 9th day of April, 1908, at 2 o'clock P. M. in which to move, demur, or plead to the information.

(Signed) JOHN B. CLELAND, *Judge.*

8 And Afterwards, on Thursday the 9th day of April, A. D. 1908, the same being the 4th Judicial day of said term of said Court there was rendered and entered in said Court an order in words and figures as follows, to-wit:

(Title.)

Now at this time on motion of John F. Logan, of attorneys for defendants, it is ordered that said defendants have 5 days further time in which to move, demur or plead to the information herein.

(Signed) JOHN B. CLELAND, *Judge.*

9 And afterwards on Tuesday the 28th day of April, A. D. 1908, the same being the 19th judicial day of said term of said court there was rendered and entered in said Court an order in words and figures as follows, to-wit:

(Title.)

Now at this time comes the State of Oregon, by Bert E. Haney, Deputy District Attorney, and the defendants appearing in person in custody of the Sheriff and by Frank Freeman, their attorney, and the defendants having been heretofore duly arraigned upon this Information the defendants by and through an interpreter each for himself pleads that he is not guilty of the crime charged in this Information.

It is ordered that the plea of not guilty of each of the defendants be and the same is hereby entered of record.

(Signed) C. U. GANTENBEIN, *Judge.*

10 And afterwards on Friday the 12th day of June, A. D. 1908, the same being the 10th Judicial day of said Term of said Court there was rendered and entered in said Court an Order in words and figures as follows, to-wit:

(Title.)

Now at this time the above entitled criminal action comes regularly on for trial before Hon. Earl C. Bronaugh, Judge. The State appearing by Dan J. Malarkey, Special Prosecutor, and by John H. Stevenson, Deputy District Attorney.

The defendant Lem Woon appearing in person in custody of the Sheriff and by John F. Logan and Frank F. Freeman, his attorneys.

The empanelling of a jury is regularly proceeded with and one juror having been examined and accepted and the hour of adjournment having arrived.

It is ordered by the Court that the further hearing of the above cause be continued until tomorrow morning at 9:30 o'clock A. M.

(Signed) EARL C. BRONAUGH, *Judge.*

11 And afterwards on Saturday the 13th day of June, A. D. 1908, the same being the 11th Judicial day of said term of said Court there was rendered and entered in said Court an Order in words and figures as follows, to-wit:

(Title.)

At this time comes the same parties and jury as of yesterday and the further hearing of the above entitled criminal action is regularly proceeded with.

The empanelling of a jury is again regularly proceeded with and five jurors having been examined and accepted and the hour of adjournment having arrived.

It is ordered by the Court that the further hearing of the above entitled cause be continued until Monday June 15th, 1908, at 9:30 o'clock A. M.

(Signed) EARL C. BRONAUGH, *Judge.*

12 And afterwards on Monday the 15th day of June, A. D. 1908, the same being the 12th Judicial day of said term of said Court there was rendered and entered in said court an order in words and figures as follows, to-wit:

(Title.)

At this time comes the same parties and jury as of Saturday, June 13, 1908, and the further hearing of the above entitled criminal action is regularly proceeded with.

The empanelling of a jury is again regularly proceeded with, four jurors having been examined and accepted.

Upon motion of Dan J. Malarkey, Special Prosecutor for the State, it is ordered by the Court that J. J. Fitzgerald be entered as an attorney of record on behalf of the State.

And the hour of adjournment having arrived it is ordered by the Court that the further hearing of the above entitled cause be continued until tomorrow morning at 9:30 o'clock A. M.

(Signed) EARL C. BRONAUGH, *Judge.*

13 And afterwards on Tuesday the 16th day of June, A. D. 1908, the same being the 13th Judicial day of said term of said Court there was rendered and entered in said Court an Order in words and figures as follows, to-wit:

(Title.)

At this time comes the same parties and jury as of yesterday and the further hearing of the above entitled criminal action is regularly proceeded with.

The empanelling of a jury is again regularly proceeded with, and now comes a jury as follows, to-wit: J. H. Barton, W. E. Brooks, Alonzo Perkins, H. W. Sitton, W. W. George, H. C. Haack, Alfred Anderson, F. W. Carroll, James Anderson, Wm. B. Cobb, Wm. J. Ferrell and H. R. Beckwith, twelve good and lawful men duly sworn to well and truly try said cause.

After hearing the allegations of respective counsel, and the hour of adjournment having arrived.

It is ordered by the Court that the further hearing of the above entitled cause be continued until tomorrow morning at 9:30 o'clock A. M.

(Signed) EARL C. BRONAUGH, *Judge.*

14 And afterwards on Wednesday the 17th day of June, A. D. 1908, the same being the 14th Judicial day of said Term of said Court, there was rendered and entered in said Court an Order in words and figures as follows, to-wit:

(Title.)

At this time comes the same parties and jury as of yesterday and the further hearing of the above entitled criminal action is regularly

proceeded with. After hearing the evidence of part of the witnesses on behalf of the State, and the hour of adjournment having arrived.

It is ordered by the Court that the further hearing of the above entitled criminal cause be continued until tomorrow morning at 9:30 o'clock A. M.

(Signed) EARL C. BRONAUGH, *Judge.*

15 And afterwards on Thursday the 18th day of June, A. D. 1908, the same being the 15th Judicial day of said term of said court there was rendered and entered in said court an Order in words and figures as follows, to-wit:

(Title.)

At this time comes the same parties and jury as of yesterday and the further hearing of the above entitled cause is regularly proceeded with. After hearing the evidence of part of the witnesses on behalf of the State, and the hour of adjournment having arrived.

It is Ordered by the court that the further hearing of the above entitled criminal action be continued until tomorrow morning at 9:30 o'clock A. M.

(Signed) EARL C. BRONAUGH, *Judge.*

16 And afterwards on Friday the 19th day of June, A. D. 1908, the same being the 16th Judicial day of said term of said court, there was rendered and entered in said court an Order in words and figures as follows to-wit:

(Title.)

At this time comes the same parties and jury as of yesterday and the further hearing of the above entitled cause is regularly proceeded with. After hearing the evidence of the remainder of witnesses on behalf of the State, counsel for the State rests its case. And the evidence of part of defendant's witnesses, and the hour of adjournment having arrived.

It it ordered by the court that the further hearing of the above entitled cause be continued until tomorrow morning at 9:30 o'clock A. M.

(Signed) EARL C. BRONAUGH, *Judge.*

17 And afterwards on Saturday the 20th day of June, A. D. 1908, the same being the 17th Judicial day of said term of said court, there was rendered and entered in said court an Order in words and figures as follows, to-wit:

(Title.)

At this time comes the same parties and jury as of yesterday and the further hearing of the above entitled criminal cause is regularly

proceeded with. After hearing the evidence of the remainder of defendant's witnesses, counsel for the defendant rests his case. After hearing the arguments of respective counsel and the instructions of the court to the jury, the jury retired in charge of a sworn office- to deliberate upon their verdict, and after a deliberation of about fifteen minutes, return into open court in charge of said officer, and through their foreman present their verdict which reads as follows, to-wit:

"We the jury in the above entitled criminal action, find the defendant Lem Woon, guilty as charged in the information.

H. W. SITTON,
Foreman."

Whereupon the jury is excused from the further consideration of the above entitled criminal cause and the jury is discharged from further attendance upon the court for the June term. And the defendant is remanded in to the custody of the Sheriff.

(Signed) EARL C. BRONAUGH, *Judge.*

18 And afterwards on the 20th day of June, 1909, there was filed in said office a verdict in words and figures as follows, to-wit:

(Title.)

We, the jury in the above entitled criminal action, find the defendant, Lem Woon, guilty as charged in the information.

H. W. SITTON,
Foreman.

19 And afterwards on the 1st day of August, 1908, there was filed in said office a motion for a new trial in words and figures as follows to-wit:

(Title.)

Comes now the defendant Lem Woon, and moves the court for an order setting aside the judgment hereinbefore made and entered in this court and cause, and for an order awarding the defendant Lem Woon a new trial, upon the ground and for the following reasons and causes, to-wit:

I.

Irregularity in the proceedings of the Court by which the said defendant was prevented from having a new trial, that said irregularities consist specifically in permitting and allowing the district attorney and special assistant district attorney to exhibit incompetent, irrelevant and immaterial objects before the jury to the prejudice of this defendant.

II.

Irregularities in orders of the Court by which the said defendant was prevented from having a fair trial.

III.

Insufficiency of the evidence to justify the verdict, and that such evidence is against the law.

IV.

Error in law occurring at the trial and excepted to by this defendant, which errors are most specifically set out in the transcript of the evidence which is hereby referred to and made a part of this motion, insufficiency of the evidence to justify the verdict, and that such evidence is against the law.

FRANK FREEMAN,
JOHN F. LOGAN,
Attorneys for Defendant.

20 And afterwards on Thursday the 1st day of October A. D. 1908 the same being the 21st Judicial day of said term of said court, there was rendered and entered in said court an order in words and figures as follows, to-wit

(Title.)

Now at this time comes on for hearing the motion of the defendant Lem Woon, for a new trial and to set aside the verdict of the jury returned hereinbefore and entered in this court and cause. The State of Oregon appearing by Dan J. Malarkey, private prosecutor. The defendant appearing in person in custody of the sheriff and by H. E. McGinn and R. E. Moody his attorneys. After hearing the arguments of respective counsel and the court being fully advised in the premises

It is ordered that the said motion be and hereby is denied and that judgment will be pronounced upon the defendant Lem Woon on Monday, October 5, 1908 at 2 o'clock A. M.

(Signed) EARL C. BRONAUGH, *Judge.*

21 And afterwards on Monday the 5th day of October, 1908. the same being the 1st Judicial day of said term of said court, there was rendered and entered in said court an order in words and figures as follows, to-wit:

(Title.)

Now at this time comes the State of Oregon, appearing by Dan J. Malarkey, special prosecutor, and the defendant Lem Woon, appearing in person in custody of the sheriff and by Henry E. McGinn of his attorneys, and said defendant having been heretofore duly informed against by the District Attorney, of the County of Multnomah, State of Oregon, on the 1st day of April, 1908, of the crime of murder in the first degree, committed in said County and State on the 7th day of March, 1908, and said defendant having heretofore on the 6th day of April, 1908, been duly arraigned on the charge of murder in the first degree, and thereafter on the

28th day of April, 1908, entered his plea of not guilty of the crime charged in the information, and the defendant Lem Woon having heretofore in said court on the 20th day of June, 1908, being duly convicted of the crime of murder in the first degree, by the verdict of the jury duly impanelled to try said cause, as appears of record herein, and defendant's motion for a new trial and motion in arrest of judgment having been heretofore denied by the court, and this being the time appointed by the court for pronouncing judgment, and no good cause appearing why judgment should not now be pronounced.

It is therefore considered and ordered by the court that the defendant Lem Woon, be confined in the county jail of the county of Multnomah, State of Oregon, and that the Sheriff of the County and State aforesaid within twenty (20) days from the date hereof, deliver said defendant Lem Woon to the superintendent of the Oregon state pentitentiary, and that said defendant be confined within the walls of said penitentiary until the 20th day of November, 1908, and that on said date the defendant Lem Woon thence be taken by the Superintendent of said penitentiary or his warden and in the manner provided by law cause the defendant
22 Lem Woon to be hanged by the neck until he is dead.

(Signed) EARL C. BRONAUGH, *Judge.*

23 And afterwards on Monday the 5th day of October, A. D. 1908, the same beng the 1st Judicial day of said term of said Court, there was rendered and filed in this Court, an order in words and figures as follows, to-wit:

(Title.)

Now at this time on motion of Henry E. McGinn, of Attorneys for defendant, it is ordered that said defendant have 20 days in which to prepare and tender his bill of exceptions herein.

(Signed) EARL C. BRONAUGH, *Judge.*

24 And afterwards on Friday the 23rd day of October, A. D. 1908, the same being the 17th Judicial day of said term of said Court, there was rendered and entered in said court, an order in words and figures as follows, to-wit:

(Title.)

Now at this time this cause coming on to be heard upon motion of Frank F. Freeman, one of defendant Lem Woon's attorneys for additional time within which to prepare and file his bill of exceptions herein.

It is ordered that the said defendant Lem Woon be and he is hereby granted ten days additional and further time to that heretofore granted within which to prepare and file his bill of exceptions herein.

(Signed) EARL C. BRONAUGH, *Judge.*

Oct. 23, 1908.

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25 And afterwards — the 24th day of October, 1908, there was filed in said office a certificate of probable cause in words and figures as follows, to-wit:

(Title.)

I, Earl C. Bronaugh, one of the Circuit Judges of the State of Oregon, for the County of Multnomah, and the judge before whom the above entitled cause was tried, hereby certifies that in his opinion there probably is cause for the appeal which has been taken by the defendant Lem Loon to the Supreme Court of the State of Oregon.

EARL C. BRONAUGH.

Dated Oct. 24, 1908.

26 And afterwards, on the 24th day of October, 1908, there was filed in said office a notice of appeal in words and figures as follows, to-wit:

In the Circuit Court of the State of Oregon for Multnomah County.

STATE OF OREGON, Plaintiff,
vs.
LEM WOON, Defendant.

To the State of Oregon, the above named plaintiff, and to George J. Cameron, District Attorney of the State of Oregon for the 4th Judicial District, and to Frank F. Fields, County Clerk of the County of Multnomah, in the State of Oregon:

You and each of you will please take notice that the defendant Lem Woon hereby appeals from the judgment made and entered herein to the Supreme Court of the State of Oregon which said judgment was rendered in the above entitled court and cause on the 5th day of October, 1908, and which judgment reads as follows; to-wit:

It is therefore ordered and considered by the Court that the defendant Lem Woon be confined in the County Jail of the County of Multnomah and State of Oregon, and that the Sheriff of the County and State aforesaid within twenty days from the date hereof deliver said defendant Lem Woon to the Superintendent of the Oregon State Penitentiary, and that said defendant be confined within the walls of said penitentiary until the 20th day of November, 1908, and that on said date the defendant Lem Woon thence be taken by the superintendent of the State Penitentiary or his warden and in the manner provided by law cause the defendant Lem Woon to
27 be hanged by the neck until he is dead.

FRANK FREEMAN,
HENRY E. McGINN,
R. E. MOODY,
JOHN F. LOGAN,
Atto'ys for Def.

STATE OF OREGON,
County of Multnomah, ss:

Due service of the within notice of appeal is hereby accepted in Multnomah County on this 24 day of Oct. 1908 by receiving a copy thereof, duly certified to as such by —— —— Attorney for —— ——.

F. S. FIELDS, *County Clerk,*
By H. C. SMITH, *Deputy.*
GEO. J. CAMERON,
District Attorney,
By J. J. FITZGERALD, *Deputy.*

28 And afterwards, on Thursday the 5th day of Nov. A. D. 1908 the same being the 3rd Judicial day of said term of said court, there was rendered and entered in said court an order in words and figures as follows to-wit:

(Title.)

Now at this time this cause coming on to be heard upon motion of John F. Logan, of Attorneys for defendant Lem Woon, for additional time within which to prepare and file his bill of exceptions herein.

It is ordered that the said defendant Lem Woon be and he is hereby granted ten days additional and further time to that heretofore granted within which to prepare and file his bill of exceptions herein.

(Signed) EARL C. BRONAUGH, *Judge.*

29 And afterwards, on Saturday the 14th day of November, A. D. 1908 the same being the 11th Judicial day of said term of said court, there was rendered and entered in said court, an order in words and figures as follows to-wit:

(Title.)

Now at this time this cause coming on to be heard upon motion of John F. Logan, one of defendant Lem Woon's attorneys, for additional time within which to prepare and file his bill of exceptions herein.

It is ordered that the said defendant Lem Woon be and he is hereby granted ten days additional and further time to that heretofore granted within which to prepare and file his bill of exceptions, herein.

(Signed) EARL C. BRONAUGH, *Judge.*

30 Be it remembered, That at a regular term of the Circuit Court of the State of Oregon, for the County of Multnomah, begun and held at the County Court House in the City of Portland, in said County and State on Monday, the 1st day of November, A. D. 1909, the same being the First Monday in said month, and the time fixed by law for holding a regular term of said Court.

Present, Hons. Earl C. Bronaugh, Robert G. Morrow, John B. Cleland, C. U. Gantenbein and William N. Gatens, Judges.

Whereupon, on this Saturday the 20th day of November, A. D. 1909, the same being the Eighteenth Judicial day of said term of said Court, among other proceedings the following was had, to-wit:

C. 764.

STATE OF OREGON, Plaintiff,
vs.
LEM WOON, Defendant.

Based upon the stipulation filed herein, it is now ordered that the Clerk of this Court shall attach the original bill of exceptions herein to the transcript on appeal to the Supreme Court, in lieu of a certified copy thereof.

(Signed) EARL C. BRONAUGH, *Judge.*

31 In the Circuit Court of the State of Oregon for the County of Multnomah.

STATE OF OREGON,
County of Multnomah, ss:

I, F. S. Fields, County Clerk and Ex-Officio Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, do hereby certify that the foregoing copies of pleadings, papers, orders and journal entries constituting the Judgment Roll, together with the Notice of Appeal in case of State of Oregon, Plaintiff and Respondent, vs. Lem Woon, Defendant and Appellant have been by me compared with the originals thereof, and that they are true and correct transcripts of such original Pleadings, Papers, Orders, Journal Entries and Notice of Appeal as the same appear of record and on file at my office and in my custody, and that the accompanying Bill of Exceptions is the original thereof as filed by me in said case.

In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court the 20th day of November, 1909.

F. S. FIELDS, *Clerk,*
[SEAL.] By H. C. SMITH, *Deputy.*

32 No. —. In the Supreme Court of the State of Oregon. Appeal from Multnomah County. State of Oregon, Plaintiff and Respondent, vs. Lem Woon, Defendant and Appellant. Transcript. Filed Nov. 22nd, 1909. J. C. Moreland, Clerk.

33 In the Municipal Court for the City of Portland, County of Multnomah, State of Oregon.

STATE OF OREGON
vs.
LUM SUE, alias LEM WOON, & YEE GON, Defendants.

Information on Felony.

STATE OF OREGON,
County of Multnomah, ss:

Be It Remembered that on this day there personally appeared before me Municipal Judge of the City of Portland a committing Magistrate, who being first duly sworn as a witness concerning the fact, upon his oath deposed and said that the crime of murder in the first degree has been committed by —— as follows, to-wit:

The said Lum Sue, alias Lem Woon, & Yee Gon, on the 7 day of March, A. D. 1908 in the City of Portland, County of Multnomah, State of Oregon, then and there being did then and there unlawfully and feloniously purposely and of their deliberate and premeditated malice, kill and murder one Lee Tai Huey, by then and there shooting him, the said Lee Tai Huey, with certain revolvers which were then and there loaded with gun powder and leaden bullets, then and thereby inflicting upon the body of him, the said Lee Tai Huey, certain mortal wounds of which said mortal wounds, he, the said Lee Tai Huey, then and there died, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated this 9th day of March, A. D. 1908.

CHIN JOHN, *Informant.*

Subscribed and sworn to before me this 9 day of March, A. D. 1908.

GEO. J. CAMERON,
Municipal Judge of the City of Portland and ex-Officio Justice of the Peace.

I move the Court on the within information, that a warrant issue for the apprehension of the said Lun Sue, alias Lem Woon,
34 & Yee Gon.

JOHN MANNING,
District Attorney,
By JOHN H. STEVENSON, *Deputy.*

GEO. J. CAMERON,
Municipal Judge.

"Endorsed:" Filed this 9th day of March, A. D. 1908. Geo. J. Cameron, Municipal Judge of the City of Portland, and Ex-Officio Justice of the Peace.

35 In the Municipal Court for the City of Portland, County of Multnomah, State of Oregon.

STATE OF OREGON
vs.
LEM WOON, YEE GUENG.

On this 14th day of March A. D. 1908, the above named defendant having been brought before me, a Municipal Judge and Ex-Officio Justice of the Peace for the City of Portland, in the County and State aforesaid in a criminal action for the crime of Murder 1st Degree, the said Lem Woon, Yee Gueng having waived the right of examination I order him to be held to answer the same, he be committed to the County Jail, there to await the action of the Grand Jury committment issued and delivered to the Sheriff of Multnomah County, State of Oregon.

GEO. J. CAMERON,
Municipal Judge and ex-Officio Justice of the Peace for the City of Portland.

STATE OF OREGON,
County of Multnomah,
City of Portland, ss:

I, F. D. Hennessy hereby certify that I am the duly appointed, qualified and acting Clerk of the Municipal Court for the City of Portland, Multnomah County State of Oregon. That the foregoing copy of Order of Transcript has been compared by me with the original, and that it is a true, full and complete copy of the original of said Order of Transcript and of the whole thereof, which original is of record in said court and is in my care and custody.

Dated this 14th day of March, 1908.

36 F. D. HENNESSY,
Clerk of the Municipal Court for the City of Portland, Multnomah County, State of Oregon.

"Endorsed:" Filed this 14th day of March, 1908. F. S. Fields, Clerk Circuit Court, By H. C. Smith, Deputy.

No. 3878.

STATE OF OREGON,
County of Multnomah, ss:

I, F. S. Fields, County Clerk of the above named County and State, and ex-officio Clerk of the Circuit Court of the County of Multnomah, State of Oregon, do hereby certify that the foregoing copy of Information and Order has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original Information and Order as the same ap-

pears in Transcript of Order Municipal Court, on file in my office and in my care and custody.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, this 21st day of Mar. A. D. 1911.

[SEAL.] F. S. FIELDS, *Clerk*,
H. C. SMITH, *Deputy*.

Endorsed: "Filed Mar. 22 1911. J. C. Moreland, Clerk of the Supreme Court, By Arthur S. Benson, Deputy."

37 In the Supreme Court of the State of Oregon, March Term, 1909.

STATE OF OREGON, Plaintiff-Respondent,
vs.
LEM WOON, Defendant-Appellant.

Continuation of Appellant's Brief.

Appeal from the Circuit Court of the State of Oregon for Multnomah County.

Hon. Earl C. Bronaugh, Judge.

Mr. George J. Cameron, District Attorney,
Mr. Joseph J. Fitzgerald, Deputy District Attorney, and
Mr. Dan J. Malarkey,
Attorneys for Plaintiff-Respondent.
Mr. John A. Logan,
Mr. Frank F. Freeman,
Mr. Ralph E. Moody and
Mr. Henry E. McGinn,
Attorneys for Defendant-Appellant.

(Endorsed): "Filed Dec. 23, 1909. J. C. Moreland, Clerk of the Supreme Court."

38 In the Supreme Court of the State of Oregon, March Term, 1909.

STATE OF OREGON, Plaintiff-Respondent,
vs.
LEM WOON, Defendant-Appellant.

Continuation of Appellant's Brief.

Appeal from the Circuit Court of the State of Oregon for Multnomah County.

Hon. Earl C. Bronaugh, Judge.

Assignment of Error XIII.

The court had no jurisdiction over the defendant, or over the subject-matter of the crime attempted to be charged.

The information charging the defendant with the crime of murder was filed by the District Attorney, under the provisions
39 of an act of the legislature approved February 17, 1899, Session Laws of 1899, page 99. This act is unconstitutional and void, violating Section 18 of Article 8, of the Constitution of Oregon, the 5th and Section 1 of the 14th amendment to the Constitution of the United States.

Assignment of Error XIV.

The information filed in this case is void and confers upon the court no jurisdiction over the defendant, or of the subject-matter.

The information in this case was neither verified nor under oath or affirmation and the defendant never had a preliminary hearing and the information is, therefore, void and contrary to Section 9, Article 1, of the Bill of Rights of the Constitution of Oregon, and the 5th and Section 1 of the 14th amendment of the United States Constitution.

In re Lowrie, 8 Colo. 508-11, 9 Pac. 489.
U. S. v. Tureaud, 20 Fed. 621.
Myers v. People, 67 Ill. 503.
State v. Gleason, 32 Kan. 245, 4 Pac. 363.
Salter v. State (Oklahoma), 102 Pac. 719.

Assignment of Error XV.

The court had no jurisdiction to pronounce judgment against the defendant and the court erred in pronouncing judgment and
40 sentence against the defendant, over the objection of the defendant, and the defendant should be discharged.

At the time that the appellant was charged with the offense involved in this case, the act of the legislature authorizing criminal prosecutions on the information of the District Attorney was in force, but prior to the sentence and entry of judgment against the defendant, the Constitution of the State of Oregon had been amended, which amendment is now in full force and effect, and was prior to the time that the defendant was sentenced, and judgment entered against him, which amendment provided that no person shall be charged in any circuit court with the commission of any crime or misdemeanor, except by an indictment found by a grand jury.

Amendment to Section 18 of Article 7 of the Constitution of Oregon.

This amendment contained no saving clause, and the amendment, therefore, operated to repeal all of the laws in conflict therewith, which repeal took effect immediately upon the adoption of the amendment, and all power derived from the statute authorizing the filing of criminal information ceased on the adoption of such Constitutional Amendment, and could not be further pur-
41 sued, the court would, thereafter have no jurisdiction or power to proceed further and all persons accused of a criminal

offense before final action by the appellate court had been had in such trial, should be discharged, and especially is this true, where judgment and sentence had not been imposed upon the accused. The court has no power or jurisdiction to proceed further in the matter, or to do any other thing than to dismiss, for want of jurisdiction, such criminal cases pending, in such circumstances, to hold the defendant; would deprive him of his liberty without due process of law, and contrary to the 5th amendment of the Constitution of the United States, and to Section 1 of the 14th amendment of the Constitution of the United States, and to Section 18 of Article 7, as amended, of the Constitution of the State of Oregon, and to Section 9, Article 1, of the Constitution of the State of Oregon.

State v. Andrews, 20 Texas, 230.
State v. Ingersoll, 17 Wis. 651.
Assessors v. Osborn, 9 Wallace, 507.
Hirschberg v. People, 6 Colo. 145.
U. S. v. Kelly, 97 Fed. 460.
Springfield v. Hamden, 6 Pick. (Mass.) 501.
Lewis Sutherland's Statutory Construction, Vol. 1, p. 554, Section 286.
Keller v. State, 12 Md. 322.
Ex parte Wilson, 114 U. S. 417.
42 Mackin v. U. S., 117 U. S. 348.
Barkinson v. U. S., 121 U. S. 281.
Ex parte McClusky, 40 Fed. 71.
Ex parte Brown, 40 Fed. 81.
U. S. v. Smith, 40 Fed. 755.
Finley v. State, 61 Ala. 201-5.
22 Cyc. 171.
Aylesworth v. State, 65 Ill. 301.
Laura v. State, 26 Miss. 124.
Ex parte Ogle, 61 S. W. 122.
French v. State, 53 Miss. 651.
Ex parte McArdle, 7 Wallace, 506.
Taylor v. State, 7 Blackf. 93.
People v. Tisdale, 57 Calif. 104.
Whitehurst v. State, 43 Ind. 473.
State v. O'Connor, 13 La. (Ann.) 486.
Commonwealth v. Pattee, 12 Cush. 501.
State v. Henderson, 13 La. (Ann.) 489.
Lunning v. State, 9 Ind. 309.
Mullinix v. State, 43 Ind. 511.
Wharton v. State, 94 American Decisions, 214, Note on page 217.

Respectfully submitted,

JOHN F. LOGAN,
FRANK F. FREEMAN,
HENRY E. McGINN AND
RALPH E. MOODY,
Attorneys for Lem Woon.

43 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Respondent,
v.
LEM WOON, Appellant.

Appeal from the Circuit Court for Multnomah County.

The Honorable Earl C. Bronaugh, Judge.

Argued and submitted March 3, 1910.
Mr. Joseph J. Fitzgerald and Mr. Dan J. Malarkey, for Respondent.
Mr. John F. Logan, Mr. Frank F. Freeman, Mr. Ralph Moody and Henry E. McGinn, for Appellant.

EAKIN, *J.*:

Affirmed.

Filed Apr. 5, 1910. J. C. Moreland, Clerk of the Supreme Court.

44 On April 1, 1908, defendant, jointly with Yee Gueng, was charged by information with the crime of murder by killing Lee Tai Hoy on March 7, 1908, and upon a separate trial was found guilty of murder in the first degree, and apepals from a judgment therein. The homicide was committed in a building at the corner of Fourth and Pine Streets, in Portland, Or. This defendant, Yee Gueng, and Jo Ah Bong, lived in two rooms on the third floor of a building at the corner of Second and Oak Streets, on the east side of Oak, being one block south and two blocks east of the place of the homicide. Defendant denied that he did the killing, and attempted to prove alibi. He also contends that his name is Lum Suey, and not Lem Woon.

John F. Logan, Frank F. Freeman, Ralph E. Moody, and Henry E. McGinn, for appellant. Joseph J. Fitzgerald and Dan J. Malarkey, for the State.

EAKIN, *J.* (after stating the facts as above):

Many of the assignments of error arise out of the fact that there is evidence tending to show that decedent, the two defendants, and most of the witnesses are Chinese, and are members of a Chinese society known as the "Bow On Tong"; that before the killing there was trouble in the Tong, which had divided it into two factions; and that decedent was blamed for this trouble. Most of the Chinese witnesses for the state and the decedent belonged to what is referred to as the new faction, and most of those for the defense belonged to the old faction, and there was evidence tending to show that the killing was the result of the trouble between the factions. The trial

was conducted principally by D. J. Malarkey, who appeared with the district attorney for the state.

The first assignment of error relates to the conduct of Mr. Malarkey in the cross-examination of Chin Lum, a witness for defendant, who belonged to the old faction of the Tong, lived in the same rooms with defendant, and testified for defendant upon his defense of an alibi. After some cross-examination as to what took place at those rooms, Mr. Malarkey asked: "Isn't it a fact that is a place where you keep a lot of knives and pistols and guns to kill people with?" This was objected to, and the objection sustained. The question was repeated in a different form, and an objection again sustained, and a third time it was asked in another form, and objected to. The objection was at first overruled, and the witness answered: "That place belong Bow On Tong, formerly Bow On Tong headquarters. Good many members come there to stay, and leave their things there. Don't know who belonged, because former time Bow On Tong been there." It appears that a box containing the weapons referred to in the question were on the clerk's desk, and were about to be presented by counsel, when the court adjourned until morning and reserved final decision for further consideration. On reconvening court, the judge announced that he was not clear as to the admissibility of this evidence, and that the defendant should have the benefit of the doubt, and excluded the evidence. Thereupon, at the request of Mr. Malarkey, the jury retired, and in their absence there was further controversy in relation to the question, and the weapons were offered in evidence, but not in the presence of the jury, when the court said: "The introduction of the weapons under such circumstances might tend to prejudice the case of this defendant in the minds of the jury. Call the jury." It is not necessary for us to determine the relevancy of the matter sought to be adduced by the question and offer, as the objections were sustained. But the inquiry is whether asking the question, the presence of the box of weapons, and the statement were prejudicial and reversible error, without other ruling by the court or exception by defendant. The first reference to the trouble in the Bow On Tong was by the defense in the cross-examination of the state's witnesses Lee Shu and Gow Ying Yuen. It was also mentioned by decedent in his dying declaration as testified to by Lee Hueng and R. W. Wilbur, and also by defendant in his direct examination, and this question was asked evidently on the theory that the trouble resulting in the shooting was a Tong fight, and we see nothing in the facts or conduct of counsel to indicate that the question was asked in bad faith or from an improper motive. The mere asking of the question was not reversible error. In this connection may be considered assignment of error No. 6, relating to the conduct of Mr. Malarkey in asking defendant's witness Sam Ah Pye, "You and Won Jake Num have fixed up a good many Chinese jobs, haven't you?" which, upon objection, was withdrawn, and no ruling was asked or exception taken, and therefore no error was committed, although the asking of such a question should not be countenanced.

The second assignment of error relates to the scope of the cross-examination of Jo Bong, a witness for defendant, and the statements of Mr. Malarkey in relation thereto. His direct examination related only to what took place in his hearing at the hospital. Defendant's counsel had previously brought out in cross-examination of the state's witnesses and by defendant himself the facts disclosed as to the Bow On Tong, the division in it, and that the Chinese witnesses belonged to one faction or the other. It was evidently the purpose of the defendant to impress upon the jury that the killing of Lee Tai Hoy was the result of a feud in the Tong, one faction against the other, rather than a personal difficulty between the slayer and Lee Tai Hoy. This purpose is also disclosed by the effort of defendant to introduce the evidence of Mr. Lord and Sam Ah Pye as to the custom of the Chinese to seek revenge in such cases against any one in the opposing faction. Jo Ah Bong, as had already been shown by the state's evidence, was present when defendant and Yee Gueng were arrested in their rooms at the corner of Second and Oak streets, having the door to the rooms locked and barred, and refused to admit the officers, and, when they forced the door, they found Jo Bong and defendant Yee Gueng in the toilet and this defendant in the other room. And, after arresting Jo Bong and Yee Gueng, they discovered on the floor of the toilet a 41 colt's revolver loaded. Upon the cross-examination of Jo Bong, Mr. Malarkey asked: "Why didn't you open the door when the officers knocked?" Counsel for defendant objected to this question on the ground that it was incompetent and not cross-examination, whereupon Malarkey remarked: "Are you objecting to having this man who was down there tell what happened there? Can't I show that you tried to seal this man's lips who was there; that he was standing on guard at the door with a gun, preventing the police getting them; * * * and I have a right to show the interest of this witness in this case and show that this witness whom you put upon the witness stand, and whom you fail to ask about what occurred at the time and place where he was present —. I have a right to develop upon his cross-examination his interest in this defendant," etc. Defendant's counsel moved that "these remarks be stricken out with reference to murderers and everything else in this case, and the remarks about the man standing on guard at the door with a pistol." The reference to "murderers and standing guard with a loaded revolver" was stricken out. The question objected to was proper cross-examination, as tending to show the interest of the witness, and the aid he was rendering defendant and the objectionable parts of Malarkey's remarks were stricken out. We find no prejudicial error in this assignment. Thereafter the witness was cross-examined at length as to his conduct from the time he ate supper until the time of the arrest, about 8 o'clock, all of which was objected to as not cross-examination, and exceptions were saved. This examination tended to show his interest and may have had a bearing upon his credibility, and was within the state's privilege of cross-examination. It is said in State v. Mah Jim, 13 Or. 235, 10 Pac. 306, that "in a

criminal case any question which tends to show a feeling or bias of the witness against the accused is competent." In State v. Olds, 18 Or. 440, 442, 22 Pac. 940, 941, it is said: "The state had the right, on cross-examination, to ask the witness anything that would show his interest in the result of the trial, and anything he did in aid of the defendant about the trial for the purpose of enabling the jury to properly weigh his evidence, and to intelligently pass upon his credibility." By section 695, B. & C. Comp., the presumption that a witness speaks the truth may be overcome by evidence affecting his motives. Section 716 provides that it is "within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness."

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At the close of the testimony of Tichenor, the pistol, which was found on the toilet floor, was admitted in evidence over defendant's objection, and this is assigned as error. The pistol does not appear to have been offered as in any way connected with the shooting of Lee Tai Hoy, but as incident to and connected with what transpired at the time the door was forced and the defendants and Jo Bong arrested, and we find no error in admitting it. Also, this evidence and that relating to the Bow On Tong, the trouble in it, the fact that defendants and decedent, as well as the witnesses, were members of it, justify the instruction defining and limiting the purpose and effect of the evidence relating to the Bow On Tong, and was not an invasion of the province of the jury. Exceptions were also taken to questions asked defendant upon his cross-examination.

For the purpose of establishing an alibi, defendant on his own behalf testified that from 10 minutes past 6 o'clock p. m. on the day of the homicide he was not out of his rooms on Second and Oak streets until he was arrested about 8 o'clock p. m. He also testified at length as to what took place at the hospital when he was taken there by the officers immediately after the arrest for identification by the wounded man. The cross-examination related among other things to whether or not Jo Bong, whom he named as one who had eaten supper there, had gone out of the rooms during the time referred to and how long he had been gone; also, as to his acquaintance with, and his identification of, Lee Tai Hoy and Lee Hueng, who were at the hospital, and as to whose statements he had testified on direct examination. To all of this cross-examination defendant objected on the ground that it was not cross-examination and made defendant a witness against himself. The state had a right to examine him as to the circumstances bearing upon the alibi, both as to the fact of his presence in the rooms and anything that might bear upon the truthfulness of his statements in relation thereto, and the same is true as to his acquaintance with decedent and Lee Hueng, so far as it relates to his identification of them; also, in his direct examination, defendant testified that his name was Lum Suey, and not Lem Woon, and the same objection was made to the inquiry by the state as to his statement made upon his arraignment, that his name was correctly stated in the information and as to the proceedings at the preliminary examination where he was referred to only as Lem Woon.

We think this was all strictly within the state's right of cross-examination. It was germane to statements made in his direct examination upon these matters. Section 1400, B. & C. Comp., makes a defendant in a criminal action competent as a witness on his own behalf, and, when offering himself as a witness, he shall be deemed to have given the prosecution a right to cross-examination upon all facts to which he has testified tending to his conviction or acquittal. The scope of such cross-examination is now settled by the case of State v. Bartmess, 33 Or. 110, 124, 54 Pac. 167, 171, where Mr. Justice Moore, speaking for the court says: "A fair construction of the statute in question leads us to conclude that defendant in a criminal action, having voluntarily testified in his own behalf, may be cross-examined in relation to all facts and matters germane to the testimony given by him on his examination in chief." And in State v. Miller, 43 Or. 325, 330, 74 Pac. 658, 659, Mr. Justice Wolverton says: "The statute, however, is not to receive an unduly restricted or narrow construction, and the cross-examination must extend the inquiry to facts and matters manifestly germane and relevant to the facts testified to in chief, tending to their explanation and elucidation, and in this respect may be as searching and broad as the foundation upon which it rests." And in the still more recent case of State v. Deal, 52 Or. 568, 98 Pac. 165, Mr. Chief Justice Bean, speaking of the cross-examination of a defendant, says: "It must now be regarded as settled that it must be confined to matters properly germane to and connected with his testimony in chief. * * * In other words, a defendant cannot under the guise of a cross-examination, be compelled, in violation of section 11, art. 1, of the Constitution of Oregon, to give evidence against himself, but, when he becomes a witness on his own behalf, he waives this constitutional guaranty as to all matters properly connected with his examination in chief, and subjects himself to such cross-examination thereon as may tend to explain, elucidate, or affect the credibility of his testimony, and such cross-examination may be as vigorous, and searching as that of any other witness." Thus, even if the cross-examination does make him a witness against himself, it is not objectionable on account thereof, provided it relates to matters properly connected with his examination in chief. No error was committed in permitting this cross-examination.

There was a conflict in the evidence as to what is the true name of defendant, but that was a question for the jury. Furthermore, the defendant was identified by several witnesses independent of the name. Lee Tai Hoy in his dying declaration pointed him out as his assailant; also, Chung Kim and Lee Shu and Gow Ying Yuen identified him as running from the house immediately after
47 the shooting, and it was for the jury to determine the fact.

During the presentation of the state's case, Malarkey called to the witness stand Jung Ah Poo, and, after he was sworn as a witness, Mr. Malarkey stated: "That the testimony, if any, that this witness will give is in my judgment only hearsay testimony, and I only called him because of the fact that counsel for the defense has intimated that they want Jung Poo." Counsel for the defense stated: "We haven't called him, and we never said we wanted him. We

asked one witness where he was, where the man that gave him the information was, and he said he was gone." Mr. Malarkey replied. "No; he said he didn't know. Now, here is Jung Poo. I do not offer him as having any personal knowledge of any facts, but, if you want Jung Poo, I do not want you to object when I call him, because you have practically made so much about Jung Poo I do not want any objection on the ground that it is hearsay evidence." Mr. Logan replied: "I desire that that be stricken out. This man is on trial for his life, and this is not to be the subject of by-play between counsel. I move to have it stricken out. The Court: "I suppose counsel has a right to make his statement when he produces the witness out of the abundance of caution." Prior to this time Lem Ling, a witness for the state, testified that he had called the police and aided in pointing out to them the defendants, and that he had obtained his information as to who had done the shooting from Jung Poo, and, when cross-examined by defendant's counsel in regard to Jung Poo, Mr. Freeman for the defense stated: "These men that incited the arrest appear to have disappeared." Mr. Malarkey: "Jung Ah Poo will be produced here if you want him." Mr. Freeman: "I was taking it from the testimony of the witness that he had disappeared. He didn't seem to know where." Mr. Malarkey: "This witness is not his guardian. We will put him on the witness stand if you want to hear him." Mr. Freeman: "Then we will find out all about this." Thus it seems there was an understanding between counsel that the state was to produce the witness, and it may have been a proper precaution for the state to do so before the close of defendant's testimony. Yet we cannot approve of the state's method of doing this. It should not have sworn him as a witness before the close of its case with no intention of asking him any questions. But no ruling was made by the court or exception taken, and no error was committed.

As to the seventh assignment of error, defendant states: "The defendant will insist that it was error on the part of the court to allow the district attorney, a judicial officer of the court, to turn over the prosecution of this case to a special prosecutor, who was in no manner an officer of the court, but was employed by the friends of Lee Tai Hoy as a special prosecutor." At the commencement of the trial, it is recited in the record that the state was represented by "Mr. John H. Stevenson and J. J. Fitzgerald, deputies to the district attorney of the Fourth judicial district of the state of Oregon, and Mr. Dan J. Malarkey, special counsel for the state." This is the only reference in the record to the matter. His right to appear was not questioned, nor is the character of his employment stated, and the question is raised here for the first time. Therefore it is not before us for decision.

The defendant attempted to show the revengeful disposition of the Chinese people as a race, to the effect that "when a trouble breaks out between two classes, or factions of the same class, and one man is injured, he does not care particularly whether he gets the assailant or the person who particularly injured him, but is satisfied if he brings injury upon one or the other side or class or faction," and for that purpose called two witnesses, Chas. F. Lord, a white man,

and Sam Ah Pye, a Chinese. This was offered, as appears, in connection with and in aid of the other evidence tending to cast doubt upon the identity of the slayer of Lee Tai Hoy; the design thereby being to discredit the state's witnesses. The evidence offered relates to Chinese customs or characteristics, and applies to the race, and not to the individual. But a rule that would admit evidence of such characteristics or customs of a class or a race to affect the credibility of an individual witness of that class or race cannot apply to the Chinese more than to the Negro, Indian, or any other people who practice them. This characteristic of the Chinese, if it does exist among them, is probably outclassed by family or neighborhood feuds existing to this day in certain localities in our own country, where wrongs of generations ago are still being avenged. To admit such evidence would be a dangerous precedent. Testimony should be received only under legal principles and rules of evidence. Section 722, B. & C. Comp., provides that "all persons, without exception (save certain persons who are incompetent) may be witnesses." By section 695: "A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character or motives, or by contradictory evidence; and where the trial is by the jury, they are the exclusive judges of his credibility." The court must determine the competency of the witness, but the jurors are the exclusive judges of his credibility and the weight to be given to his evidence. All persons who are competent to testify, regardless of age, relation, race, or color, stand equal before the law under the presumption of this statute, Shelp v. United States, 81 Fed. 694, 26 C. C. A. 570. And the circumstances or evidence to affect his credibility must relate to and
48 affect the individual. Anything beyond this would not only be unreliable but dangerous. Wigmore, in his work on Evidence, after discussing at some length testimonial qualifications of witnesses, and comparing the relative credibility of witnesses, and the value of testimony of people of different races and color, says, at section 516: "Taking all these considerations together, it may be concluded that any judgment of condemnation for the testimony of aliens in general, or of particular races or peoples, is likely to be, in the first place, absolutely incorrect as not founded on facts; in the second place, relatively unjust, as assuming a superiority of honesty which can only be hypothetical; in the third place, unwise, as tending merely to perpetuate ill-feeling and misunderstanding; and, finally, unsound in principle, as excluding indiscriminately a mass of testimony which ought to be weighed and credited in each individual instance for what it may seem to be worth." It is said in United States v. Lee Huen (D. C.) 118 Fed. 442, and indorsed by Wigmore at section 936, that: "If it affirmatively appears that a witness has a bias in favor of persons of his own nationality, in whose behalf he is testifying, or against the other party to the litigation, or a bias in favor of persons of his own nationality generally, or against those of another nationality, such fact may be used to discredit his testimony." And the same rule should apply to a bias of the witness in favor of or against a family or faction to which the

wrongdoer belongs, if the latter cannot be reached. But it certainly would be incompetent to show the reputation or trait of character of a class or race of people as to matters that might discredit the race for the purpose of discrediting the testimony of an individual of that race. Each witness should stand or fall by his own character, motives or customs, and not that of his race. In Shelp v. United States, 81 Fed. 694, 698, 26 C. C. A. 570, 574, the same principle was involved and the following instruction to the jury was approved: "(1) It is a fact that Indians lie, and it is also a fact that white men lie, and some of the most civilized and cultured men are among the greatest liars. The evidence of Indian witnesses is entitledto as much credit and weight as the evidence of white men, and such credibility and weight are determined by the same rules of law. (2) In weighing the evidence of witnesses, you have a right to consider their intelligence, their appearance upon the witness stand, their apparent candor and fairness in giving their testimony, or the want of such candor or fairness, their interest, if any, in the result of this trial, their opportunities of seeing and knowing the matters concerning which they testify, the probable or improbable nature of the story they tell, and from these things, together with all the facts and circumstances surrounding the case, as disclosed by the testimony, determine where the truth of this matter lies." This is in accord with sections 722, 695, B. & C. Comp., above quoted, that provide that "all persons without exception * * * may be witnesses," and "a witness is presumed to speak the truth," and specifying the methods by which a witness may be discredited. The credibility of a Chinese witness must be determined by the rules of law applicable to other witnesses. It is said in Woey Ho v. United States, 109 Fed. 888, 48 C. C. A. 705, in referring to the credibility of witnesses, that "all people, without regard to their race, color, creed or country, * * * stand equal before the law." In McDaniel v. Monroe, 63 S. C. 307, 41 S. E. 456, it is said: "The credibility of a witness is not to be tested by the color of the witness or by the race to which he belongs." And by that test evidence that tends to cast discredit upon the race cannot be received to discredit an individual witness. It is said in Shelp v. United States, supra: "The truth is that, in law, both classes stand upon the same plane. The weight and credibility of every witness is to be determined in the manner set forth in the clause marked '(2)' (of the instruction above quoted), which contains a clear and correct statement as to the duty of jurors in weighing the testimony of the witnesses whether they be white men or Indians." The result of these discussions, upon this subject, is to the effect that matters by which it is sought to discredit a witness must be such as affect the individual witness. He must be heard and recognized in his individual capacity, and not condemned or discredited because of the race to which he belongs or by its customs or reputation. We find no error in excluding the evidence offered.

Defendant also excepted to the court's instruction as to the flight of defendant. There was some evidence tending to show that defendant ran from the place of the shooting immediately after the homicide, and soon thereafter was barricaded in the rooms where

he was found and arrested after the officers had forced the door. The term "fleeing from justice," as used in the United States statutes, is defined in United States v. O'Brian, 27 Fed. Cas. No. 15,908, as "to leave one's home or residence or known place of abode within the district, or to conceal one's self therein with intent in either case to avoid detection or punishment for some public offense against the United States." In the case before us the court left it to the jury to determine whether defendant did flee on account of this homicide, and only charged them as to the effect of such flight, if found by them that he did flee, as bearing upon the probability of his guilt or innocence, and was not an invasion of the province of the jury, and was not error. We find no error in the manner of giving of the instruction asked by Mr. Malarkey, and no objection was taken to the law as stated in the instruction.

49 Assignments of error 13, 14, and 15 relate to the trial of the defendant upon an information which was filed under section 1258, B. & C. Comp. These questions were decided adversely to defendant's contention in State v. Ju Nun, 53 Or. 1, 98 Pac. 513, to which we adhere.

The judgment of the lower court is affirmed.

50 Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday the 7th day of March 1910

Whereupon on this Tuesday the 5th day of April, 1910, the same being the 15th judicial day of said term, there were present:

Hon. Frank A. Moore, Chief Justice,
Hon. Robert Eakin, Associate Justice,
Hon. Thomas A. McBride, Associate Justice,
Hon. Woodson T. Slater, Associate Justice,
Hon. William R. Kin, Associate Justice, and
J. C. Moreland, Clerk.

when the following proceedings were had:

STATE OF OREGON, Respondent,
v.
LEM WOON, Appellant.

Appeal from Multnomah County.

This cause having, on the 3d day of March, 1910, been duly argued and submitted to the court upon and concerning all the questions arising upon the transcript and record, and then reserved for further consideration. And the court having duly considered all the said questions, as well as the suggestions made by counsel in their argument and briefs, finds that there is not error as alleged. It is therefore ordered and adjudged by the court that the judgment of the court below in this cause rendered and entered be and the same is, in all things affirmed.

And it is further ordered that the respondent recover of and from

the appellant its costs and disbursements in this court taxed at $—.

And it is further ordered that this cause be remanded to the court below from which this appeal was taken with directions to enter a judgment in accordance herewith and to take such proceedings as may be proper to carry out the judgment of the court.

51 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Plaintiff-Respondent,
vs.
LEM WOON, Defendant-Appellant.

The defendant, Lem Woon, respectfully asks the Court that a rehearing be granted him. He feels that in the opinion filed by the Court on the 5th of April last, there are some errors and inaccuracies highly prejudicial to him, which he can establish to the satisfaction of the Court, if he is permitted to re-argue this cause.

I.

In the first place, on page 975 of Volume 107 of the Pacific Reporter, at the bottom of the page is found this expression: "It appears that a box containing the weapons referred to in the question, were on the Clerk's desk and were about to be presented by Counsel, when the Court adjourned until morning and reserved final decision for further consideration." It is to be noted here that this box which was about to be presented, had been during the entire introduction of the State's case, on the clerk's desk and in full view of the jury, though until the Defendant went into his case, there was no effort made by the State to have these weapons formally introduced in testimony.

As it appears in the opinion, the weapons were casually there only for a moment, when, as a matter of fact, they had been present during the entire time that the State was presenting its case; as clearly it appears from the testimony of officer Tichener (See testimony of Tichener, pages 84 and 85 of the Bill of Exceptions—See pages 56 and 57 of Appellant's Brief).

Of course there was no formal objection made to the box of weapons during the time that they were in the Court Room, until Counsel made the formal proposal to introduce them in testimony;
52 doubtless for the reason that Counsel feared to give too much prominence to these weapons. Now the presence of these weapons in the Court Room and in plain sight of the jury, could only excite a feeling of prejudice of the most terrible kind against the Defendant. Counsel had attempted by indirection to do what he would not be directly allowed to do. Courts have always allowed new trial in all such cases. Exceptions can only be taken to direct offers, to things which are directly offered and directly done—They cannot be taken to indirect and underhanded methods of doing things; and what a man cannot directly do, the Courts will not permit him to indirectly attempt to do.

May we ask the Court in this connection to consider what is said in Section 1157 of Wigmore on Evidence—and note what is said by the learned author at the end of Section 1157, of the necessity of proper authentication of weapons before their introduction; and remember that not a weapon in the box, which was in full sight of the jury, was ever connected with the defendant in any way.

II.

The Court has said on page 976 of the 107th Pacific Reporter, in the opinion delivered in this Cause: "Although the asking of such a question should not be countenanced"—Yet the Court has countenanced the asking of the question, and this too in a capital case, which means the taking of the life of a human being by legal proceedings. On this subject may we ask the Court to see what we say under point IV hereafter.

III.

There can be found no authority in any law book which we have ever seen, which will uphold the Court's ruling for the introduction of the pistol which was found on the toilet floor at the lodging house where the defendant lived. The Court says, in its opinion: "The pistol does not appear to have been offered as in any way connected with the shooting of Lee Hoy." If it were not connected with the shooting of Lee Tai Hoy, its introduction in the testimony was clearly immaterial and prejudicial to the Defendant in the highest degree. This alone should grant the defendant a rehearing in this cause. The pistol was never used by the defendant, was never in his possession, or in any manner connected with him or with the crime.

53 Will the Court please consider the cases which are found in the 12th Cyc. 394 under caption "F"—Instruments or weapons connected with offense—And will the Court please read Wigmore on Evidence, Vol. II. 1157. This exact point was ruled in our favor in State v. Kehr, 133 Iowa, 35, 37; point (2).

IV.

We now come to the point, urged by the Appellant, in relation to Jung Ah Poo. The Court has said, in the opinion found in the Pacific Reporter, Vol. 107, page 978, when speaking of this Jung Poo incident: "Yet we cannot approve of the State's method of doing this. It should not have sworn him as a witness before the close of its case, with no intention of asking him any question; but no ruling was made by the Court or exception taken, and no error was committed." Yet the Court admits that a great wrong was done this Defendant—A wrong against a legal right of his, highly prejudicial to him. Counsel had done by indirection again what he could not have directly done, nor what he would not have attempted to do directly.

There is no ruling the Trial Court could have made under the circumstances, that would have cured the error or removed the preju-

dice which thus was intended to be created and was created in the minds of the jurors.

No exception is necessary. May we be pardoned for calling to the Court's attention again what was said by that able Judge, De Haven, in the case of People vs. Ah Len, 92 Cal., 282, 285.

"It follows that the only safe and just rule in such cases is to make it impossible for a party to derive any advantage from such misconduct of counsel by promptly granting a new trial to the adverse party, unless it is clear that the verdict was not affected thereby. It may be added that if the fact stated by counsel had been introduced in evidence, against the objections of appellants, it would have been sufficient to reverse the judgment, as the fact is itself an irrelevant one. It had no legitimate tendency to prove any issue in this case, but it was one which, as urged by counsel for the prosecution, was well calculated to illustrate the violence of appellants, and this was doubtless the object of bringing it to the attention of the
54 jury, but the character of a Defendant on trial for murder is not subject to this kind of attack."

And again at page 284 the same able Judge says:

"It is true that the attorney for the prosecution in this case was not permitted by the court to comment at any length upon the facts which he himself imported into the case; but while this was to the credit of the court, it does not change the fact that a matter not in evidence and of a nature clearly prejudicial to the appellants, was laid before the jury for the purpose of affecting their verdict, and it is no answer to this to say that the jury may have disregarded it."

Nor can an exception be taken where the objection has been sustained by the Court; but where the result of any conduct is to prejudice a defendant in his legal rights, the Courts grant new trials wherever they think prejudice was created, though Counsel for the State was not permitted to do what he intended to do. See further upon this point what is said by Prof. Wigmore in his work on Evidence, Vol. III, Sec. 1808, Subdivision II.

V.

The Court in the opinion filed did not pass upon the assignment of Error X—This assignment of error is set forth by us on page 218 of the Appellant's brief, and is not waived, but is still strongly urged by us.

We submit that in a case involving a man's life, where upon his trial, substantial legal rights have admittedly been transgressed; where every manner of indirection was resorted to, to obtain a verdict, and this conduct too condemned by the Court, that it would be improper that a life should be forfeited simply because an omission is made of some rule of procedure which should have been followed.

As we said in presenting this case before, this Court has always said that procedure must give way to substance when legal rights of this kind have been violated.

Will the Court please read, before passing judgment finally upon this case, State vs. Wilcox 131 N. C., 707; and Collier vs. State 115 Ga. 803.

May we in conclusion, say with Mr. Justice De Haven, in the case from which we have already quoted: "that the only safe and
55 just rule in such cases, is to make it impossible for a party to derive any advantage from such misconduct of Counsel, by promptly granting a new trial to the adverse party, unless it was clear that the verdict was not affected thereby."

This Defendant believing that, from the admissions made by this Court in its opinion, as well as from the numerous other errors found in this record, *that* he has not had that fair and imparital trial which the law contemplates he shall have, respectfully requests your Honors to permit him to present his case to the Court once more.

JOHN A. LOGAN,
FRANK F. FREEMAN,
RALPH E. MOODY, AND
HENRY E. McGINN,
Attorneys for the Defendant, Lem Woon.

PORTLAND, OREGON, *June* 29, 1910.

Service accepted and copy received.

GEORGE J. CAMERON,
DAN J. MALARKEY,
J. J. FITZGERALD,
Attorneys for Respondent.

56 Endorsement: Case No. 7173. Drawer No. 716. In the Supreme Court of the State of Oregon. State of Oregon, Plaintiff, Respondent, vs. Lem Woon, Defendant, Appellant. Lem Woon's Petition for a Re-Hearing. Filed June 20, 1910. J. C. Moreland, Clerk of the Supreme Court.

57 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Respondent,
v.
LEM WOON, Appellant.

Appeal from the Circuit Court for Multnomah County.

The Honorable Earl C. Bronaugh, Judge.

On Petition for Rehearing.

Affirmed April 15, 1910. 107 Pac. 974.

Joseph F. Fitzgerald and Dan J. Malarkey, for respondent.
John F. Logan, Frank F. Freeman, Ralph E. Moody and Henry E. McGinn for appellant.

McBride, J.
Denied.
King, J., and Slater, J., Dissent.

Filed Dec. 31, 1910. J. C. Moreland, Clerk of the Supreme Court.

58 McBRIDE, *J.*:

All the questions raised on this motion are fully discussed by Mr. Justice Eakin in the original opinion in this case, which is reported in 107 Pac. 974, and we shall adhere to the views therein expressed.

Upon this motion counsel, however, lay particular stress upon the action of the court in admitting in evidence the pistol found by officer Tichenor in the toilet at the time he arrested Yee Gueng and Jo Bong. Independent of the fact adverted to in the original opinion that the finding of the pistol was an incident of the arrest and, therefore, admissible, we are of the opinion that, upon well known principles of law, it was admissible on other grounds. The evidence of Lee Shu was direct and positive that he saw this defendant and Yee Gueng and another unknown Chinaman in the hall of the building of deceased, assaulting him, and that they each had pistols. Immediately after this Gow Ying Yuen saw three Chinamen run out of the building and recognized defendant and Yee Gueng as two of them. They were last seen by him going down Oak Street in the direction of the building in which they were afterwards arrested, and only a short distance therefrom. In about half an hour the officers arrived at the room where defendants were arrested and were refused admission. When they finally succeeded in breaking down the door they found Yee Gueng and Jo Bong concealed in a dark closet; a loaded pistol, which gave evidence of having been recently discharged, lying on the floor of the closet; and Lem Woon in a bunk in the adjoining room.

Here is evidence tending to show three things: (1) That defendant was present at the scene of the shooting, in company with Yee Gueng, and that they and another Chinaman were engaged in a felon-ous assault, with fire arms, on deceased. (2) That they fled together to the same building. (3) That a pistol which to all appearances had been recently discharged and reloaded was in the same closet where Yee Gueng had been concealed, under circumstances which indicated to any reasonable mind that it was one of the pistols used by the conspirators in perpetrating the mur-
59 der. Now it makes no difference which one of the three conspirators fired the fatal shot, if the evidence shows that all three were present, aiding and abetting therein. There is strong evidence tending to show that at least three or four bullets were shot from the pistol of Lem Woon, but several bullets are not accounted for, and not found, and the evidence of Tichenor is to the effect that the pistol, found by him in the closet when he arrested Yee Gueng, showed powder stains in the barrel, indicating its recent use.

These circumstances show a criminal conspiracy between Yee Gueng, Lem Woon and another Chinaman to murder the deceased. Nor does the admission of the pistol in evidence come within the rule that under most circumstances forbids the introduction of testimony as to acts or declarations of a conspirator after the termination of the conspiracy. The finding of the pistol and its condition was neither an act nor a declaration; it was a fact indicating that when Yee Gueng was seen with defendant, armed and assaulting

the deceased, he was doing so with intent to murder, and assisted in its perpetration; and this intent and the consequences of it are imputable to the defendant, who, as other evidence tends to show, was present, assisting in the commission of the crime. The pistol was no more an act or declaration of Yee Gueng than was the closet in which he was arrested. It was a mute but forceful witness, corroborating the testimony of Lee Shu, that the defendant and Yee Gueng were armed at the scene of the shooting. It further tended to show that the purpose of their being there was homicidal, and, in some degree, that it had been used for the purposes of the murder.

It is significant that the defendant and Yee Gueng were never so far as the testimony discloses, twenty feet apart from the time the homicide was committed until they were arrested. They were seen together armed at the scene of the shooting; they were seen running away together from the scene of the crime; and they were arrested in the same building, a very short time afterwards, in rooms in close proximity to each other.

60 In a somewhat extended experience in criminal trials the writer has never seen a case of murder in the first degree more clearly and conclusively proved, and to seek now some mere pretext to set aside a verdict obtained after a fair and impartial trial would be to encourage crime and make a mockery of the law.

The petition is denied.

61 KING, *J.* (Dissenting):

At the time of the filing of the former opinion I acceded with some hesitation to the conclusion there announced, but after a careful re-examination into the errors assigned, and the law and evidence applicable thereto, I am unable to concur in the conclusion reached by the majority.

It will be remembered that Lem Woon, at the time of his arrest, while in what is termed the same apartments as those occupied by his co-defendant, was not one of the two Chinamen found hiding in the toilet where the pistol was discovered; the accused, when arrested, being in an adjacent room, and there is no testimony tending to show that the 41 Colt's revolver, offered in evidence, was at any time in his possession or under his control; nor does it appear that Lem Woon was in hiding or attempting to escape detention, further than that he was in a room adjoining the one occupied by his co-defendant, and that the entrance to the entire apartments was barred; these rooms being the regular abode of the defendant and nine or ten others of his race. The revolver was admitted in evidence against him, over the timely and proper objections of his counsel. It is well settled that subsequent declarations and acts, unless shown to be intimately and closely connected with the transaction, are not admissible against one accused of a crime. State v. Smith, 43 Or., 109; State v. Ching Ling, 16 Or., 419. The weapon was found in the place where Yee Gueng and Jo Bong were hiding, under such circumstances, and in such close proximity to them as

to indicate its contemplated use by them in resisting arrest, if necessary, thus indicating to some extent at least that they were attempting to escape, from which guilt might be inferable, and so justify the revolver's admission in evidence against them, as held by us in State v. Yee Gueng, decided at this time. But, so far as serving to connect this defendant with the crime, the same rule does not apply. If admissible at all it is only on the theory that it was a circumstance incident to the arrest, tending to show an effort to escape or in some manner to elude the officers. This assumption cannot be held, for the weapon was not in Lem Woon's possession, and the fact that it was found in an adjacent toilet, occupied by others, is too remote. In this connection, it must be remembered, there were nine other regular occupants of the apartments at the time, that is the quarters occupied by them was a Chinese lodging house. The mere fact that the Chinese society had formerly met there at various times was insufficient to justify the admission in evidence of the pistol in question against any or all persons
62 happening to be either a member of such society, or found to be rooming in the quarters, without in some manner connecting them also with the weapon offered in evidence. This revolver was in the same position, with reference to its admissibility, as was the box of firearms found, the admission in evidence of which the court refused.

To admit the weapon, under the proof accompanying it, is to rely on an inference from an inference, and not a deduction from an established fact, and this character of evidence is expressly excluded by §785, B. & C. Comp., which provides that the inference must be founded:

"1. On a fact legally proved; and

2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

It will thus be seen that an inference could only be founded on a fact legally proved. No fact is here proved from which it may be inferred that this defendant owned the weapon in question, or in any manner possessed or inten-ed to use it in resisting arrest. The circumstance of the door being locked indicates to some extent that he was evading the officers, and, affording equal protection to all the occupants against arrest, might, if offered, have entitled the lock to admission in evidence; for that fact, once established, its purpose made inference as much against one occupant as another; the weight to be given thereto depending largely upon the conduct thereof after the door was forced open. This feature, however, was proved, and from it the jury might have inferred all were advoiding arrest, but these inferences were from established facts, and not inconsistent with the usual propensities or passions of men, mentioned in the above section of the code.

Not so, however, as to the pistol admitted. No proof whatever appears associating defendant with it. To connect him in any manner therewith it must be inferred that he either owned the

weapon or placed it in the toilet in which others were hiding, and from that again infer that the motive for which it was placed in the toilet was for its use in resisting arrest by the occupants, of which he was not one. This is not only too remote a circumstance to entitle the weapon to admission, but is in violation of the above section of the statute: State v. Hembree, 54 Or., 463. See also: 8 Cyc., 680; 6 Ency. Ev., 699; 2 Wigmore Ev., §1157, p. 135; McBride v. Commonwealth, 95 Va., 818; State v. Arthur, 129 Ia., 235; 63 State v. Kehr, 133 Ia., 35; Riggins v. State, 42 Tex. Crim., 472. Mr. Wigmore condemns the practice of admitting this class of testimony, and the Encyclopedia of Evidence above cited holds that, "As a circumstance tending to connect the accused with the act charged, it is competent to show his possession of a deadly weapon or instrumentality similar to that with which the homicide appears to have been committed, at the time thereof, or within a reasonable time previous or subsequent, or that he prepared such a weapon for use. But it is not proper to show the possession of a weapon with which the wound could not have been inflicted." The rule thus stated is fully sustained by the other authorities cited. Under the authority of State v. Wintzingerode, 9 Or., 153, we held this class of evidence in Yee Gueng to be admissible against those found in possession of the weapon, or in whose special hiding place it was discovered, but the same reasons cannot be invoked for its admission here.

That the admission of the weapon in evidence against this defendant must have prejudiced the jury against the accused seems clear—as much, if not more, than did the admission of the photographs admitted in evidence in State v. Miller, 43 Or., 325, on account of which a new trial was ordered. The observations in that case on this point apply with equal force here. After stating that photographs under some circumstances (concerning which the same may be here remarked with regard to firearms) are admissible, and after illustrating the class of cases in which they may properly be offered in evidence, Mr. Justice Wolverton on page 328 of the opinion remarks:

"But unless they are necessary in some matter of substance, or instructive to establish material facts or conditions, they are not admissible, especially when they are of such a character as to arouse sympathy or indignation, or to divert the minds of the jury to improper or irrelevant considerations." (Citing Baxter v. Chicago & N. W. R. Co., 104 Wis., 307; Selleck v. City of Jonesville, 104 Wis., 570; Fore v. State, 75 Miss., 727.)

So it may here be said that the admission of a weapon in evidence, not shown in any manner to be connected with this defendant, tended to divert the minds of the jury to improper and irrelevant considerations. Especially must this be true when it is remembered that the excluded box of weapons was, during a large part of the trial, permitted to remain in sight of the jury, to which was added the circumstance of the special counsel for the State requesting the witness by whom the revolver was identified to go to the box of weapons and take out this one, which the witness, in the presence

of the jury, did. All of this tended to direct the attention of the jury to the wholesale collection of weapons excluded, which
64 were clearly inadmissible—as much so as weapons found in a gunsmith's shop adjacent to a room occupied by one charged with murder.

Error is also predicated upon the remarks and interrogatories of the special counsel during the trial, much of which is set out in the former opinion in this case, the objection and consideration of which also excludes the alleged error of the court in admitting much of the cross-examination of Chin Ling, a witness for the state. The cross-examination of this witness, in my opinion, was permitted to be extended beyond reasonable limits. Much of it had no reference directly or indirectly to anything brought out on the direct examination. Regardless of this feature, however, the conduct of the special counsel, adverted to in the former opinion, in placing Jung Ah Poo upon the witness stand in the manner complained of, and in bringing matters before the jury by remarks and interrogatories (held to be highly improper, even though objections to much of the course pursued were sustained), manifestly tended to prejudice the rights of the accused, and while probably no one of the statements or remarks could be deemed sufficient to justify a reversal, yet taken as a whole they must, unless we disregard the legal rights of the accused, make a reversal necessary.

The impropriety and the prejudicial effect of the interrogations and remarks of the character complained of are fully and ably considered in People v. Wells, 100 Cal., 459. In that case the defendant was charged with forgery. A Mr. Staniels was put on the stand as a witness for the prosecution. Afterwards the captain of the police, as a witness for the state, was examined, and the prosecuting attorney asked him this question: "I want to ask one leading question, and do not answer it until counsel has an opportunity to object. Is it a fact that a short time after that Staniels came to you and reported about Wells wanting him to tell the woman to skip?" To this inquiry an objection was made and sustained. In referring to this interrogatory the Appellate Court observed:

"There was not the slightest excuse for asking this question * * * What, then, was its purpose? Clearly, to take an unfair advantage of appellant by intimating to the jury something that was either not true, or not capable of being proven in the manner attempted. And the wrong was not remedied because the court sustained an objection to the question."

The court then proceeds to discuss other interrogatories of like character, which it will be noticed were analogous in effect and propriety to those here under consideration, and the observations concerning which apply with equal force to those here presented, upon which a reversal is asked. Mr. Justice McFarland, beginning on page 461 of the opinion, remarks:

65 "The inexcusable asking of the foregoing question would not be, perhaps, of itself sufficient ground for reversing the judgment, but it is of importance when taken in connection with questions asked the defendant when a witness, as showing the gen-

eral manner and temper with which the prosecution was conducted. Upon cross-examination of appellant the prosecuting attorney asked him these questions: 'Where did you formerly reside? Do you know the Highland National Bank of Newbough, New York? Were you married to your present wife when you came here with her? Did you not admit in a letter to Mr. M. C. Belknap that in November, 1893, you forged your father-in-law's name to a note in New York?' To these questions counsel for appellant objected as incompetent, immaterial, irrelevant, and not in cross-examination; declared that they were unfair to appellant, and asked the court to instruct the district attorney not to ask any more such questions. The record merely shows that after discussion the objections were sustained. The first three of these questions are important mainly as leading up to the last one, the asking of which was utterly inexcusable and reprehensible. It would be an impeachment of the legal learning of the counsel for the people to intimate that he did not know the question to be improper and wholly unjustifiable. Its only purpose, therefore, was to get before the jury a statement, in the guise of a question, that would prejudice them against appellant. If counsel had no reason to believe the truth of the matter insinuated by the question, then the artifice was most flagrant; but if he had any reason to believe in its truth, still he knew that it was a matter which the jury had no right to consider. The prosecuting attorney may well be assumed to be a man of fair standing before the jury, and they may well have thought that he would not have asked the question unless he could have proved what it intimated if he had been allowed to do so. He said plainly to the jury what Hamlet did not want his friends to say: "As, 'well we know;' or, 'We could, an- if we would;' or, 'if we list to speak;' or, 'There be, an- if there might.'" This was an entirely unfair way to try the case; and the mischief was not averted because the court properly sustained the objection—though we think it should have warned counsel against the course which he was taking—and instructed the jury specially on the subject. The wrong and the harm was in the asking of the question. Of course, in trials of criminal cases questions as to the admissibility of evidence will frequently arise about which lawyers and judges may fairly differ in opinion; and in such cases defendants must be satisfied when courts sustain their objections. But where the prosecuting attorney asks a defendant questions which he knows, and every judge and lawyer knows, to be wholly inadmissible and wrong, and where the questions are asked without the expectation of answers; and where the clear purpose is to prejudice the jury against the defendant in a vital matter by the mere asking of the questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have influenced the verdict."

The holding in the above case is fully sustained by the great weight of authority. In fact but few cases may be found where a continued course or attempt to ask questions ruled out by the court, tending to convey to the jury matters not admissible in evidence,

and which, by their nature, are damaging in effect to the accused, have not resulted in a reversal. State v. Blodgett, 50 Or., 329; State v. Bartlett, 50 Or., 440; State v. Reed, 52 Or., 377.

As to other errors assigned I express no opinion. I deem the errors above considered ample to disclose that defendant did not receive the fair and impartial trial guaranteed by law to all persons, regardless of race or station in life, the recognition of which by the courts is essential to the safety of our citizens and to the perpetuity of our form of government.

The judgment should accordingly be reversed, and a new trial ordered.

Mr. Justice Slater concurs in this dissent.

66 Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday the 3d day of October 1910.

Whereupon on this Saturday the 31st day of December 1910 the same being the 18th judicial day of said term, there were present:

Hon. Frank A. Moore, Chief Justice,
Hon. Robert Eakin, Associate Justice,
Hon. Thomas A. McBride, Associate Justice,
Hon. Woodson T. Slater, Associate Justice,
Hon. William R. King, Associate Justice, and
J. C. Moreland Clerk,

and when the following proceedings were had:

STATE OF OREGON, Respondent,
v.
LEM WOON, Appellant.

Appeal from Multnomah County.

Now at this time it is ordered by the court that the petition for rehearing pending in this cause, be and the same is in all respects overruled and denied.

67 SUPREME COURT, STATE OF OREGON, *ss:*

I, J. C. Moreland, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of The State of Oregon, Plaintiff vs. Lem Woon, Defendant, save and except the Bill of Exceptions from the lower court filed in this court in said cause.

I further certify that the foregoing contains a copy of the opinion of the court rendered therein, and the judgment entered thereon, as the same appears of record in my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed

the seal of said court at my office in Salem, Oregon, this 28th day of March, 1911.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND,
Clerk Supreme Court of Oregon.

68 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Plaintiff and Respondent,
vs.
LEM WOON, Defendant and Appellant.

Petition for Writ of Error.

To the Honorable Robert Eakin, Chief Justice of the Supreme Court of the State of Oregon:

The petition of Lem Woon, by John F. Logan, Frank F. Freeman, James E. Fenton and Ralph E. Moody, his attorneys, hereby sets forth that on or about the 31st day of December, 1910, the Supreme Court of the State of Oregon made and entered the final judgment herein in favor of the State of Oregon and against Lem Woon, defendant, which said final order and judgment affirmed the defendant's conviction in the Circuit Court of the State of Oregon for Multnomah County of murder in the first degree, in which final judgment and proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of Lem Woon, all of which will more in detail appear from the Assignment of Errors which is filed with this petition.

2.

That the said Supreme Court of the State of Oregon is the highest court of the State of Oregon in which a decision in this suit and this matter could be had.

69 Wherefore, Lem Woon petitions and prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Oregon for the correction of errors so complained of, and that a transcript of record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 28th day of January, A. D. 1911.

LEM WOON,
By JOHN F. LOGAN,
FRANK F. FREEMAN,
JAMES E. FENTON,
RALPH E. MOODY,
His Attorneys.

Due and legal service of the above petition is hereby accepted and acknowledged for the State of Oregon this 28th day of January, 1911.

GEO. J. CAMERON,
District Attorney for the Fourth Judicial District of the State of Oregon.
A. M. CRAWFORD,
Attorney General of Oregon.

70 [Endorsed:] In Supreme Court State of Oregon State of Oregon, Pl'ff & Respondent, v. Lem Woon, Def't & Appellant. Petition for Writ of Error. Filed Jan. 28, 1911. J. C. Moreland, Clerk of the Supreme Court, By Arthur S. Benson, Deputy.

71 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Plaintiff and Respondent,
vs.
LEM WOON, Defendant and Appellant.

Assignment of Errors.

Now comes the above named defendant and files herewith his petition for writ of error, and says that there are errors in the records and proceedings of the above entitled cause, and, for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignments:

The Supreme Court of the State of Oregon erred in holding and deciding that an act of the legislature of the State of Oregon, entitled "An Act to provide for criminal prosecutions on information made by the District Attorneys, to authorize District Attorneys to administer oaths or affirmation to witnesses and to compel them to testify, to further define contempts and the crime of perjury, and providing when the Circuit Court may convene a grand jury," approved by the Governor February 17th, 1899, is valid. The validity of said Act was denied and drawn in question by the defendant, on the ground of being repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States and in contravention thereof.

The Supreme Court of the State of Oregon erred in holding and deciding that the information charging the defendant with the crime upon which he was placed on trial was valid and conferred upon the court jurisdiction over the defendant and of the subject-
72 matter. The validity of said information and the jurisdiction of the court by the said information over the defendant or the subject-matter, was drawn in question by the defendant on the ground that such information was repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States and in contravention thereof, it appearing from the record that the said information was neither verified nor under oath or

affirmation and that the defendant never had a preliminary hearing.

The Supreme Court of the State of Oregon erred in holding and deciding that the Circuit Court had jurisdiction to pronounce judgment against the defendant, and erred in sustaining the action of the Circuit Court in pronouncing judgment and sentence against the defendant over the objection of the defendant and erred in holding and deciding that the defendant should not be discharged. The jurisdiction of the Court, and its right to pronounce judgment against the defendant was denied and drawn in question by the defendant, on the ground that the same was repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of the State of Oregon erred in holding and deciding:

First. That the Act of the Legislature of the State of Oregon, entitled "An Act to provide for criminal prosecutions on information made by the District Attorneys, to authorize District Attorneys to administer oaths or affirmation to witnesses and to compel them to testify, to further define contempts and the crime of perjury, and providing when the Circuit Court may convene a grand
73 jury," approved by the Governor February 17th, 1899, was valid, and that said Act did not abridge the privileges and immunities of citizens of the United States, and of this defendant, as guaranteed by section 1 of the Fourteenth Amendment to the Constitution of the United States.

Second. That by the provisions of said Act the defendant is not deprived of liberty and property without due process of law, as guaranteed by the said Fourteenth Amendment to the Federal Constitution.

Third. That the Supreme Court of the State of Oregon erred in holding and deciding that the information filed in the case, which charged the defendant with the crime for which he was placed upon trial, the said information being neither verified nor under oath or affirmation, and the defendant never having had a preliminary hearing, was valid and conferred upon the court jurisdiction over the defendant or of the subject-matter, and that the trial of the defendant upon said information did not abridge the privileges and immunities of citizens of the United States and of this defendant as guaranteed by section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fourth. That by a trial upon said information the defendant is not deprived of liberty and property without due process of law, as guaranteed by the said Fourteenth Amendment to the Federal Constitution.

Fifth. That the Court had jurisdiction to pronounce judgment against the defendant and in pronouncing judgment and
74 sentence against the defendant and refusing to discharge the defendant, it appearing that at the time the appellant was charged with the offense involved in the case the act of the legis-

lature authorizing criminal prosecutions on information of the District Attorney was in force but prior to the sentence and entry of judgment against the defendant the Constitution of the State of Oregon had been amended, which amendment is now in full force and effect and was prior to the time that the defendant was sentenced and judgment entered against him, which amendment provided that no person shall be charged in any Circuit Court with the commission of any crime or misdemeanor except by an indictment found by the grand jury. This amendment contained no saving clause, and the amendment therefore operated to repeal all the laws in conflict therewith, which repeal took effect immediately upon the adoption of the amendment; and the Court erred in holding and deciding that the judgment and sentence did not abridge the privileges and immunities of citizens of the United States and of this defendant, as guaranteed by section 1 of the Fourteenth Amendment to the Constitution of the United States.

Sixth. That by such judgment and sentence the defendant is not deprived of liberty and property without due process of law, as guaranteed by the said Fourteenth Amendment to the Federal Constitution.

Seventh. That the Court had jurisdiction over the defendant or the subject-matter.

Eighth. That the defendant was not entitled to be discharged and in refusing to discharge him.

75 Ninth. That the privileges and immunities of this defendant, as guaranteed by section 1 of the Fourteenth Amendment to the Constitution of the United States, were not abridged.

Tenth. That the defendant was not deprived of liberty and property without due process of law, as guaranteed by the said Fourteenth Amendment to the Federal Constitution.

For which errors the defendant, Lem Woon, prays that the judgment of the Supreme Court of Oregon, dated the 31st day of December, 1910, be reversed, the information dismissed and held for naught, and that a judgment be entered for the defendant, Lem Woon.

JOHN F. LOGAN,
FRANK F. FREEMAN,
JAMES E. FENTON,
RALPH E. MOODY,
Attorneys for Defendant, Lem Woon.

Due and legal service of the above assignment of errors is hereby accepted and acknowledged for the State of Oregon this 28th day of January, 1911.

GEO. J. CAMERON,
District Attorney of the Fourth Judicial District of the State of Oregon.
A. M. CRAWFORD,
Attorney General of Oregon.

76 [Endorsed:] In Supreme Court, State of Oregon. State of Oregon, Pl'ff & Respondent, vs. Lem Woon, Def't & Appellant. Assignment of Errors. Filed Jan. 28, 1911. J. C. Moreland, Clerk of the Supreme Court, By Arthur S. Benson, Deputy.

77 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Plaintiff and Respondent,
vs.
LEM WOON, Defendant and Appellant.

Order.

The above entitled matter coming on to be heard upon the petition of Lem Woon, appellant herein, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Oregon, and upon an examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the question presented by the record in said matter.

It is ordered, that a writ of error as herein prayed for be and the same is hereby allowed to this court from the Supreme Court of the United States and that the writ of error operate as a supersedeas.

Dated this 31 Day of January, A. D. 1911.

ROBERT EAKIN,
Chief Justice of the Supreme Court of the State of Oregon.

78 [Endorsed:] In Supreme Court, State of Oregon. State of Oregon, Pl'ff & Respondent, vs. Lem Woon, Def't & Appellant. Order. Filed Feb. 1, 1911. J. C. Moreland, Clerk of the Supreme Court, By Arthur S. Benson, Deputy.

79 In the Supreme Court of the United States.

LEM WOON, Plaintiff in Error,
vs.
STATE OF OREGON, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the state of Oregon, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in

the said suit between the State of Oregon, the defendant in error and Lem Woon, the plaintiff in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said Lem Woon, the plaintiff in error, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this be-
80 half, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within sixty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court of the United States, the 1st day of February, in the year of our Lord, 1911.

[United States Circuit Court, Oregon.]

G. H. MARSH,
Clerk United States Circuit Court,
District of Oregon.

Allowed by—

ROBERT EAKIN,
Chief Justice of the Supreme Court
of the State of Oregon.

Due and legal service of the foregoing writ of error is hereby accepted and acknowledged, and copy received Feb'y 1st, 1911.

GEO. J. CAMERON,
J. J. FITZGERALD,
DAN J. MALARKAY,
Attorneys for the State of Oregon,
the Defendant in Error.
A. W. CRAWFORD,
Att'y Gen. Or.

81 [Endorsed:] In the Supreme Court of the United States. Lem Woon, Plaintiff in Error, vs. State of Oregon, Defendant in Error. Writ of Error. Filed Feb. 2, 1911. J. C. Moreland, Clerk of the Supreme Court, By Arthur S. Benson, Deputy. Ralph E. Moody, Attorney at Law, McKay Building, Portland, Oregon.

82 In the Supreme Court of the United States.

LEM WOON, Plaintiff in Error,
vs.
STATE OF OREGON, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

To the State of Oregon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the state of Oregon, wherein Lem Woon, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert Eakin, Chief Justice of the Supreme Court of the State of Oregon, this 1st day of February in the year of our Lord, 1911.

ROBERT EAKIN,
Chief Justice of the Supreme Court of the State of Oregon.

Due and legal service of the foregoing citation is hereby accepted and acknowledged and copy received and appearance is hereby made in the Supreme Court of the United States, of the State of Oregon, the defendant in error herein, February 1st, 1911.

GEO. J. CAMERON,
J. J. FITZGERALD,
DAN J. MALARKAY,
Attorneys for the State of Oregon, the Defendant in Error.
A. W. CRAWFORD,
Att'y Gen. Or.

83 [Endorsed:] In the Supreme Court of the United States. Lem Woon, Plaintiff in Error, vs. State of Oregon, Defendant in Error. Citation. Filed Feb. 2, 1911. J. C. Moreland, Clerk of the Supreme Court, By Arthur S. Benson, Deputy. Ralph E. Moody, Attorney at Law, McKay Building, Portland, Oregon.

84 SUPREME COURT, STATE OF OREGON, *ss:*

I, J. C. Moreland, clerk of the said court, do hereby certify that there was lodged and filed with me as such clerk, in the matter of the State of Oregon v. Lem Woon the following papers:

1. The Original Petition for Writ of Error, with proof of service endorsed thereon;
2. The Original Assignment of Errors, with proof of service endorsed thereon;
3. Order allowing the Writ of Error.
4. The Original Writ of Error, with proof of service endorsed thereon;
5. The Original Citation with proof of service endorsed thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Salem, Oregon, this 28th day of March, 1911.

[Seal Supreme Court, State of Oregon, 1859. The Union.]

J. C. MORELAND,
Clerk of the Supreme Court of Oregon.

85 UNITED STATES OF AMERICA,
Supreme Court of Oregon, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same, save and except the Bill of Exceptions from the lower court on file in my office.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oregon, in the City of Salem, this 28 day of March, 1911.

[Seal Supreme Court, State of Oregon, 1859. The Union.]

J. C. MORELAND,
Clerk of the Supreme Court of Oregon.

Costs:

Cost of Transcript $45.00 paid by Ralph E. Moody of Attorneys for Plaintiff in Error.

Endorsed on cover: File No. 22,605. Oregon Supreme Court. Term No. 261. Lem Woon, plaintiff in error, vs. The State of Oregon. Filed April 6th, 1911. File No. 22,605.

Office Supreme Court
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IN

The Supreme Court

of the United States

October Term, 1912

No. 261

LEM WOON,
Plaintiff in Error

vs.

STATE OF OREGON,
Defendant in Error

BRIEF FOR APPELLANT

JOHN F. LOGAN,
FRANK F. FREEMAN,
JAMES E. FENTON,
RALPH E. MOODY,
Attorneys for Plaintiff in Error.

(22,605)

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IN

The Supreme Court

of the United States

October Term, 1912

No. 261

LEM WOON,
Plaintiff in Error

vs.

STATE OF OREGON,
Defendant in Error

Writ of Error from the Supreme Court of the State of Oregon

BRIEF FOR APPELLANT

STATEMENT.

On the 1st day of April, 1908, there was filed in the office of the clerk of the Circuit Court of the State of Oregon for Multnomah County the information of the district attorney of the Fourth Judicial District of the State of Oregon, charging Lem Woon and Yee Gueng with the crime of murder in the first

degree. A severance was had and the defendants were tried separately. And thereafter on the 12th day of June, 1908, the trial of the defendant Lem Woon, the plaintiff in error, upon the information came regularly on before the court and jury, and thereafter on the 20th day of June, 1908, the jury found the plaintiff in error guilty as charged in the information; and thereafter on the 5th day of October, 1908, an order was entered upon the said verdict and directed that the plaintiff in error be on the 20th day of November, 1908, executed in the manner provided by law; and thereafter on the 24th day of October, 1908, the plaintiff in error appealed from said judgment to the Supreme Court of the State of Oregon; and thereafter on the 5th day of April, 1910, the Supreme Court of the State of Oregon rendered its decision affirming the judgment of conviction of and against the plaintiff in error; and thereafter a petition for rehearing was filed with the Supreme Court of the State of Oregon, which court on June 20, 1910, entered an order denying the petition and adhering to its former decision affirming the judgment of conviction; and thereafter on the 31st of January, 1911, a writ of error as regularly prayed and petitioned for was allowed by the Supreme Court of the State of Oregon, to the Supreme Court of the State of Oregon from the Supreme Court of the United States, which writ of error was duly and regularly thereafter issued in the manner provided by law on the 1st day of February, 1911.

SPECIFICATIONS OF ERROR.

I.

That the Supreme Court of the State of Oregon erred in holding and deciding that the act of the Legislature of the State of Oregon entitled, "An act to provide for criminal prosecutions, to authorize district attorneys to administer oaths or affirmations to witnesses and to compel them to testify, and further defining contempts and the crime of perjury, and providing when Circuit Courts may convene grand juries," approved by the Governor February 17, 1899, was valid, and that said act did not abridge privileges and immunities of citizens of the United States, and of this defendant, as guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States.

II.

That the Supreme Court of the State of Oregon erred in holding and deciding that by the provisions of said act the defendant is not deprived of liberty and property without due process of law as guaranteed by said Fourteenth Amendment of the Federal Constitution.

III.

That the Supreme Court of the State of Oregon erred in holding and deciding that the information filed in this case, which charged the defendant with the crime for which he was placed upon trial, the

said information being neither verified nor under oath or affirmation, and the defendant never having had a preliminary hearing, was valid and conferred upon the court jurisdiction over the defendant or the subject-matter, and that the trial of said defendant upon said information did not abridge the privileges and immunities of citizens of the United States and of this defendant as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

IV.

That the Supreme Court of the State of Oregon erred in holding and deciding that by a trial upon said information the defendant is not deprived of liberty and property without due process of law as guaranteed by the said Fourteenth Amendment of the Federal Constitution.

V.

That the Supreme Court of the State of Oregon erred in holding and deciding that the court had jurisdiction to pronounce judgment against the defendant, and in pronouncing judgment and sentence against the defendant, it appearing that at the time the appellant was charged with the offense involved in the case the act of the Legislature authorizing criminal prosecutions on information of the district attorney was in force, but prior to the sentence and entry of judgment against the defendant the Constitution of the State of Oregon had been amended,

which amendment is now in full force and effect, and was in full force and effect prior to the time that the defendant was sentenced and judgment entered against him, which amendment provided that no person shall be charged in any Circuit Court with the commission of any crime or misdemeanor except by indictment found by the grand jury. This amendment contained no saving clause, and the amendment therefore operated to repeal all the laws in conflict therewith, which repeal took effect immediately upon the adoption of the amendment, and the court erred in holding and deciding that the judgment and sentence did not abridge the privileges and immunities of citizens of the United States and of this defendant as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

VI.

That the Supreme Court of the State of Oregon erred in holding and deciding that by such judgment and sentence the defendant is not deprived of liberty and property without due process of law as guaranteed by said Fourteenth Amendment to the Federal Constitution.

VII.

That the Supreme Court of the State of Oregon erred in holding and deciding that the court had jurisdiction over the defendant and the subject-matter.

VIII.

That the Supreme Court of the State of Oregon erred in holding and deciding that the defendant was not entitled to be discharged, and in refusing to discharge him.

IX.

That the Supreme Court of the State of Oregon erred in holding and deciding that the privileges and immunities of this defendant as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States were not abridged.

X.

That the Supreme Court of the State of Oregon erred in holding and deciding that the defendant was not deprived of liberty and property without due process of law as guaranteed by the said Fourteenth Amendment to the Federal Constitution.

ARGUMENT.

The act of the Legislature of the State of Oregon, approved February 17, 1899, authorizing criminal prosecution on information by the district attorney is as follows:

Section 1. Hereafter it shall be lawful for the district attorney of any judicial district of this state, and it is hereby made his duty, to file in the proper Circuit Court an information charging any person or persons with the commission of any crime defined

and made punishable by any of the laws of this state, and which shall have been committed in the county where the information is filed.

Section 2. Information shall be substantially in the form prescribed in Section 1269 (70) of the criminal code of the State of Oregon as compiled and annotated by W. Lair Hill, except the words "district attorney" shall be used instead of the words "grand jury" wherever the same occur. And the manner of stating the act constituting the crime as set forth in the appendix to said criminal code shall be sufficient in any such information in all cases where the forms there given are applicable; and in other cases forms may be used as nearly similar as the nature of the case shall permit.

Section 3. From the time any information is filed as provided in this act the same shall be construed like an indictment, and shall be deemed to be in all respects the same as an indictment within the meaning of the present statutes of this state, and thereafter until and including final judgment and execution. The same proceedings shall be had, and with like effect, as in cases where indictments are returned by a grand jury; provided, that when a defendant has been held to answer, as provided in Chapter XXXVII of said criminal code, the information against him shall be filed on or before the first day of the next regular term of the Circuit Court before which he is required to appear, unless such Circuit Court, upon good cause stated by the district attorney, shall extend the time; otherwise,

on the second day of such term, or at the expiration of the time so extended, the court must order that the defendant, if in custody, be discharged, or if he has given bail that his sureties be exonerated or money deposited in lieu of bail be refunded. But such order shall not be a bar to another prosecution for the same crime unless it shall be a misdemeanor.

Section 4. Any person within this state can be compelled by subpoena to appear before a district attorney to testify as a witness, in like manner as before a grand jury, concerning any crime inquired of by such district attorney, and any district attorney shall have power to administer oaths or affirmations to witnesses and to compel them to testify. If any person to whom a district attorney has administered an oath or affirmation shall willfully testify falsely as to any matter material to the inquiry being made by such district attorney, such person shall be deemed guilty of perjury, and shall be punished accordingly; and the refusal to be sworn or to testify as a witness before a district attorney shall be deemed a contempt of the Circuit Court of the county in which such refusal shall occur, and shall be punishable accordingly.

Section 5. The name of each witness examined on oath or affirmation by a district attorney in the support of any information shall be inserted at the foot of such information or endorsed thereon before the same is filed, otherwise the testimony of such witness cannot be heard against the defendant at the trial of such information.

Section 6. The district attorney may also file an information in manner and form as provided in Sections 1 and 2 of this act in the following cases: (1) Whenever an indictment returned by a grand jury has been set aside, or a demurrer thereto sustained, and the grand jury returning the same is not in session or has been discharged; (2) when a case has been appealed to the Supreme Court and reversed on account of any defect in the indictment or information; (3) when an information filed as hereinbefore provided has been set aside, or the demurrer thereto sustained, and the court grants leave for or directs the filing of another information.

Section 7. This act shall not prevent the Circuit Court from convening a grand jury whenever in its opinion it is deemed advisable to do so.

The Supreme Court of the State of Oregon in **State v. Tucker, 36 Ore. 291**, and in **State v. Guglielmo, 46 Ore. 250**, sustained the constitutionality of the law authorizing district attorneys to file informations. And the Supreme Court of the State of Oregon in the case of **State v. Belding, 43 Ore. 95**, held that one may be proceeded against by information without having been examined before a magistrate, and that one may be charged by information without having had a preliminary examination; and in the case of **State v. Guglielmo, 46 Ore. 250**, the Supreme Court of Oregon held and decided that an information filed by a district attorney required no verification other than the official oath of the district attorney.

We therefore have the question presented to this court in this case under the first, second, third and fourth assignments of errors whether a statute which authorizes and permits a district attorney to file an information against one, charging him with a felony, without leave of court and without the necessity of a preliminary hearing or the privilege or opportunity of waiving one, unsupported by any oath or affirmation other than the official oath of office of the district attorney is constitutional, and not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and does not deprive one of his liberty and property as guaranteed by the Fourteenth Amendment to the Federal Constitution.

This court in **Hurtado v. The People of the State of California, 110 U. S. 516,** held that the words "due process of law" in the Fourteenth Amendment to the Constitution of the United States do not necessarily require an indictment by the grand jury in a prosecution by the state for murder, and affirmed the conviction upon such information for murder in the first degree and sentence of death thereon, which prosecution by information was authorized by the penal code of the State of California, within the authority of the Constitution of California permitting prosecution for felony by information after examination and commitment by a magistrate.

In the Hurtado case it is to be noted that the court is careful to make mention that before a district attorney could file his information it was necessary that there be a preliminary examination, and

in the subsequent decisions of this court, in which the Hurtado Case has been reaffirmed and applied, it will be observed that a preliminary examination in each of the cases was necessary to be had, or the opportunity offered of waiving it before the prosecuting officer would be authorized to file his information. But under the law of the State of Oregon as construed by the Supreme Court of this state, which construction, under the familiar rule, this court is bound by, it is not necessary that the accused be given a preliminary examination or be offered the opportunity of waiving one.

The fact that the plaintiff in error waived a preliminary hearing does not affect the question suggested as to the validity of the law, for under the law as hereinbefore stated such preliminary hearing is not required. For this reason this law gives arbitrary and despotic power to a prosecuting officer, and is essentially different from the law of California which was sustained by this court, and is objectionable for lack of the very elements of the California law which this court was careful to make mention of in order to support its decision. Under this statute, in the language of the Supreme Court of the State of Oregon in the case of **State v. Belding, 43 Ore. 99,** "It is possible that a district attorney * * * might cause one to be arrested and without preliminary examination be lodged in jail, charged by the district attorney with a non-bailable crime (Constitution of Oregon, Article I, Section 14), to abide the result of his trial in the Circuit Court upon an information, thus depriving him in the meantime of

any opportunity to establish his innocence; and though the letter of the law may have been strictly kept by the procedure adopted, the spirit of fairness that has ever characterized American jurisprudence as applied to criminal prosecutions would thereby be grossly violated." Again, "It must be admitted that the act of 1899 under consideration vested the district attorney with vast power, which, if oppressively exercised, might possibly abridge the constitutional right of one accused of a crime to demand the nature and cause of the accusation against him." And the court further observed in that case: "The right of the Legislative Assembly to prescribe the manner of procedure in the trial of criminal actions, when not violative of an organic act of the state, is conceded; but as the practice under the act of 1899 has evoked much criticism from the members of the bar, upon the theory that the district attorney has been clothed with too much power, an amendment of that act, so as to make it conform to and bring it in harmony with the spirit of the age, would undoubtedly conduce to the general welfare of the state and safeguard the interest of those persons who may be accused of the commission of crimes upon information."

Arbitrary power in a single individual to bring a citizen into court and place him on trial for a crime is so contrary to the spirit of the Fourteenth Amendment as to be considered obnoxious to the provisions of that article. **In re Humason, 46 Fed. 388-390.**

The Supreme Court of the State of Montana in the case of **State v. Brett, 16 Mont. 360, 40 Pac. Rep. 873,** holds that under the constitution of that state

allowing criminal actions to be prosecuted by information "after examination and commitment by a magistrate or after leave granted by the court" an information may be filed with leave of court without examination and commitment. It will be noted, however, that the court makes particular mention of the fact that where an investigation into one's guilt or innocence is had before a committing magistrate and a commitment is the result, such judicial inquiry is sufficient to justify the county attorney in prosecuting in the district court without obtaining leave of that court to file an information formally charging the defendant with the offense for which he was examined, observing "the prosecution rests in the guaranty of the right to a judicial review of the matter by an impartial magistrate." And the court further observed: "Where no examination has been had before a magistrate, and no commitment has been made in such a case to protect the rights of the defendant and to guard him against oppression or malice, and to prevent abuse of any general power vested in the county attorney, leave of the district court is necessary to be obtained, thus again there is a guaranty that a judicial order will be required before there can be even a charge preferred." And the court in that case further observes: "Guided by the discussions and logical reasoning of such constitutional expounders as Justices Miller and Bradley, we are of the opinion that by the clause under discussion the framers of the constitution of the state formulated a somewhat new and presumably improved procedure in criminal

cases, limited, but general in its application; always circumscribed in its operation by depending upon the sound approval of the court before its power may be legally invoked to charge a citizen with crime who has never had the opportunity of a hearing before a committing magistrate, or whose conduct has not been investigated by a grand jury."

In the case of **In re Dolph, 17 Colo. 35, 28 Pac. 470,** the Supreme Court of Colorado held that a felony may be prosecuted by information where the probable guilt of the accused had been ascertained and certified by a previous preliminary examination. We particularly call the court's attention to this case, for an examination of it discloses the fact that the information law was sustained only upon the ground that before the same could be filed it was necessary that the accused be afforded a preliminary examination.

It is respectfully submitted that the plaintiff in error has been deprived of his liberty without due process of law, and that the decision of the Supreme Court of the State of Oregon sustaining the validity of the act authorizing criminal prosecutions on information by the district attorney was erroneous and should be reversed.

Respectfully submitted,

JOHN F. LOGAN,
FRANK F. FREEMAN,
JAMES E. FENTON,
RALPH E. MOODY,
Attorneys for Plaintiff in Error.

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IN

The Supreme Court

of the United States

October Term, 1912

No. 261

LEM WOON,
Plaintiff in Error,

vs.

STATE OF OREGON,
Defendant in Error.

In Error to the Supreme Court of the State of Oregon

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF CASE

On March 3, 1908, Lem Woon, Plaintiff in Error, was accused by a duly verified complaint made to and filed with the Judge of the Municipal Court of the City of Portland, who was, by virtue of his office, a committing magistrate under the Oregon statutes, with the crime of murder in the killing of Lee Tai Hoy, and, having been

arrested and brought before said Magistrate, waived examination and was held to answer for said charge. (See pages 13 and 14 of Transcript of Record.)

On April 1, 1908, the District Attorney of the Fourth Judicial District of the State of Oregon filed in the Circuit Court for Multnomah County an Information charging said Lem Woon with said crime of murder; and thereafter said Lem Woon was tried and convicted in said Court of said crime with which he was so charged by said information. (See pages 2 to 9 of Transcript of Record.)

From said judgment of conviction Lem Woon appealed to the Supreme Court of the State of Oregon; and upon said appeal said Court affirmed said judgment; and said judgment of affirmance so rendered by said Supreme Court is, by Writ of Error, brought here for review.

At the time said Information was so filed by said District Attorney the Oregon statutes authorized prosecutions by and under such an Information. The only provision of said statutes necessary to quote here is Section 1 of the Act of 1899—known and hereinafter referred to as the "Information Law"—which is found on page 99 of the 1899 Session Laws and in Section 1258 of Bellinger and Cotton's Annotated Codes and Statutes of Oregon, and which reads as follows:

> "Hereafter it shall be lawful for the district attorney of any judicial district of this state, and it is hereby made his duty, to file, in the proper circuit court, an information charging any person or per-

sons with the commission of any crime defined and made punishable by any of the laws of this state, and which shall have been committed in the county where the information is filed."

There was nothing in the provisions of the Constitution of Oregon allowing the enactment of said Information Law nor in said Information Law itself which required any examination before or commitment by a magistrate as a condition precedent to the institution of a prosecution in the Circuit Court by an Information filed by the District Attorney.

On June 1, 1908, after said Information had been so filed against Lem Woon and before he was tried and convicted thereunder, Section 18 of Article VII of the Constitution of Oregon, under the previous wording of which prosecutions by Information were allowable, was amended so as to include therein a clause reading as follows:

"No person shall be charged in any Circuit Court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this State, except upon indictment found by a Grand Jury."

By his petition for the Writ of Error issued herein and his Assignment of Errors filed therewith two questions are presented for the consideration of this Court. The first contention is that, independent of the above mentioned constitutional amendment, the prosecution of Lem Woon under said Information Law in the manner

above stated was repugnant to and in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the second contention is that the prosecution should not have been continued under said Information after the Oregon Constitution was amended as above stated and that the continuance of such prosecution was also repugnant to and in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

We have not yet received or had an opportunity to read the brief of Plaintiff in Error, and in writing this brief we must assume that the argument in his brief will be such as is suggested by the wording of the Assignment of Errors and the oral statements made to us by opposing counsel of the points intended to be raised thereby.

Because this Court has, in the late case of **Ross v. Oregon, 227 U. S. 150,** decided the identical question raised by the above mentioned second contention adversely to such contention, and because counsel for Plaintiff in Error have informed us that they do not intend to undertake any reargument of that question in this case, our argument herein will be confined to the above mentioned first contention.

ARGUMENT.

In the following cases the Supreme Court of Oregon sustained the validity of the Information Law in question and held that it did not violate any provision of

either the Constitution of Oregon or the Constitution of the United States:

State v. Tucker, 36 Or. 291;
State v. Belding, 43 Or. 95;
State v. Guglielmo, 46 Or. 250;
State v. Ju Nun, 53 Or. 1.

Following its holdings in the four above mentioned cases, said Supreme Court decided the question now under consideration against the contention of Plaintiff in Error when the same was presented to it in this case.

In **Hurtado v. California, 110 U. S. 516,** this Court held that the Fourteenth Amendment to the Constitution of the United States does not require an indictment by a Grand Jury in a prosecution by a State for felony and that a statute authorizing such a prosecution by an Information was not repugnant to said Amendment.

Adhering to the decision in the **Hurtado Case** this Court has sustained the validity of Information Laws of various states in the following later cases:

McNulty v. California, 149 U. S. 645;
Hodgson v. Vermont, 168 U. S. 262;
Bolln v. Nebraska, 176 U. S. 83;
Maxwell v. Dow, 176 U. S. 581;
Davis v. Burke, 179 U. S. 399;
Dowell v. United States, 221 U. S. 325.

The proposition urged by Plaintiff in Error, as we understand it, is that, through a prosecution by Information after examination and commitment by a Magistrate is "due process of law," the prosecution of Lem Woon under said Oregon Information Law was not

"due process of law" because said Oregon information law did not require such an examination and commitment by a Magistrate as a condition precedent to the filing of the Information by the District Attorney.

Upon this particular phase of the question the Oregon Supreme Court in **State v. Tucker, 36 Or. 291-302,** spoke as follows:

> "It may be a matter about which reasonable minds may differ, whether he should have a preliminary examination before being subjected to an accusation and public trial before a court of justice, or as to the appropriate steps to be taken before an information may be preferred. But these matters are legislative in their import—made so necessarily, under the constitution, by virtue of the power given to modify grand juries; and, while the wisdom of the law may be a subject of dispute, the authority to enact it cannot be gainsaid."

And in **State v. Belding, 43 Or. 95,** it was expressly and directly held that the District Attorney could file an information without the defendant having had a preliminary examination before a Magistrate and that the Oregon Information Law was not invalid because it permitted that official to do so.

It is true that the provision of the California Constitution and the statute adopted thereunder, which were considered in the **Hurtado Case,** required an examination and commitment by a Magistrate as a condition precedent to prosecution by Information; but there is nothing in the reasoning of or the authorities cited in the opinion in that case which make it any less

applicable to a law authorizing prosecutions by Information without such preceding examination or commitment than to the particular law under consideration therein; and the authorities and reasoning and conclusions of said opinion would as much sustain the validity of the Oregon Information Law as they do sustain the validity of the California Information Law. Nor is there any expression in any later decision of this Court sustaining the validity of prosecution by Information which warrants the distinction undertaken to be made in this case between an Information Law which requires an examination and commitment by a Magistrate to precede the filing of the Information and an Information Law that does not require such.

Is a defendant who is convicted under prosecution by an Information deprived of his life or liberty "without due process of law" if he has not been examined or committed by a Magistrate before said Information is filed against him? That is the specific question in this case; and the answering thereof involves a consideration of the meaning of "due process of law."

In **Missouri v. Lewis, 101 U. S. 22,** this Court said:

> "We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to pre-

vent its doing so. This would not, of itself, within the meaning of the 14th Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

In **Hurtado vs. California, 110 U. S. 516,** this Court said:

"The natural and obvious inference is that, in the sense of the constitution, "due process of law" was not meant or intended to include, **ex vi termini,** the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the fourteenth amendment to restrain the action of the states, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the fifth amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon congress by the constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the fourteenth amendment, by parity of reason, it refers to the law of the land in each state which derives its

authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure."

In **Ex parte Converse, 137 U. S. 624,** this Court said:

"Appellant has been subjected, as all persons within the state of Michigan are, to the law in its regular course of administration through courts of justice, and it is impossible to hold that a judgment so arrived at is such an unrestrained and arbitrary exercise of power as to be utterly void. We repeat, as has been so often said before, that the fourteenth amendment undoubtedly forbids any arbitrary deprivation of life, liberty, or property, and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses, but it was not designed to interfere with the power of the state to protect the lives, liberty, and property of its citizens, nor with the exercise of that power in the adjudications of the courts of a state in administering the process provided by the law of the state."

In **Caldwell v. Texas, 137 U. S. 692,** this Court said:

"By the fourteenth amendment the powers of the states in dealing with crime within their borders are not limited, but no state can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and, when secured by the law of the state,

the constitutional requisition is satisfied. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

In **Leeper v. Texas, 139 U. S. 462,** this Court said:

"It must be regarded as settled that whether the statutes of a legislature of a state have been duly enacted in accordance with the requirements of the constitution of such state is not a federal question and the decision of state courts as to what are the laws of the state is binding upon the courts of the United States, and that by the fourteenth amendment the powers of state in dealing with crime within their borders are not limited, except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law, and that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied, and that due process is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

In **Brown v. New Jersey, 175 U. S. 172,** this Court said:

"The state is not tied down by any provision of the federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named it may avail itself of the wisdom gathered by the experience of

the century to make such changes as may be necessary. For instance, while at the common law an indictment by the grand jury was an essential preliminary to trial for felony, it is within the power of a state to abolish the grand jury entirely and proceed by information."

In **Maxwell v. Dow, 176 U. S. 581,** this Court said:

"The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several states have the same right to provide by their organic law for the change of both or either. Under this construction of the amendment (referring to the Fourteenth Amendment) there can be no just fear that the liberties of the citizen will not be carefully protected by the states respectively. It is a case of self-protection, and the people can be trusted to look out and care for themselves. There is no reason to doubt their willingness or their ability to do so, and when providing in their Constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal government that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials, whether there shall be an indictment or an information only, whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. These are matters which have no relation to the character of the Federal government."

That any defendant fairly and regularly tried and convicted under the Oregon Information Law is not de-

prived of his life or liberty without "due process of law" seems too clear under the definitions and explanations of that phrase contained in the foregoing quotations from decisions of this Court to require argument. If the State of Oregon can deny a trial by a jury to a person accused of violating one of its penal statutes, it certainly can prosecute such a person by Information without his being first examined and committed by a Magistrate.

Lem Woon was prosecuted in the same way and under the same law that all other offenders of Oregon were being prosecuted at the time that he was prosecuted—the only difference being that many were informed against without being first given the opportunity of having a preliminary examination before a Committing Magistrate, an opportunity which he voluntarily waived. J. Thorburn Ross, whose conviction was affirmed by this Court in one of the cases above cited, was prosecuted and convicted under the same Oregon Information Law.

Lem Woon is not being arbitrarily deprived of his life. No different or higher punishment is being imposed on him than on others for like offenses. The Oregon Information Law operated on all alike and was not applied in his case so as to subject him to any arbitrary exercise of the powers of government.

Even if it were held that the Fourteenth Amendment would be violated if a defendant were prosecuted by Information without examination before and commitment by a Magistrate, such holding would not secure

a reversal of the judgment of the State Court convicting Lem Woon; for the record shows that he was committed by a Magistrate and that the only reason why there was no examination before such commitment was that he voluntarily waived such examination.

Though the identical question raised here may not already have been decided by this Court because not previously raised therein, it has been decided by the Courts of last resort in other states than Oregon. Amongst other cases holding in accordance with **State v. Tucker, 36 Or. 291**, are: **State v. Sureties of Krone, 4 Wyo. 347; State v. Brett, 16 Mont. 360**; and **State v. Anderson, 30 La. Ann. 557.**

In said Wyoming case Chief Justice Groesbeck, after reviewing and discussing many of the decisions concerning the validity of prosecution by Information, said:

> "Although these cases intimate very clearly that the courts have regarded with much dislike a proceeding by information by a single official without a previous judicial inquiry as to probable cause of guilt, as we did in the case of In re Wright supra, it has never been held, in any case which we have found, after the most diligent search, that such a provision, however caustically it has been condemned as unwise or harsh, is obnoxious to the constitutional guaranty that no person shall be deprived of life or liberty without due process of law, or any other constitutional safeguard erected for the protection of the citizen."

We respectfully submit that there is neither reason nor authority to sustain the contention of Plaintiff in

Error and that the judgment of the State Court should be affirmed.

A. M. CRAWFORD,
Attorney General for the State of Oregon;
WALTER H. EVANS,
District Attorney of the State of Oregon for Multnomah County; and
DAN J. MALARKEY,
Attorneys for Defendant in Error.

LEM WOON *v.* STATE OF OREGON.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 261. Submitted April 25, 1913.—Decided June 9, 1913.

The "due process of law" clause of the Fourteenth Amendment does not require the State to adopt the institution and procedure of a grand jury; nor does it require an examination, or the opportunity for one, prior to a formal accusation by the district attorney by information. *Held* that the Information Law of 1899 of Oregon is not unconstitutional as denying due process of law.

Ross v. *Oregon*, 227 U. S. 150, followed to the effect that the subsequent amendment to the constitution of Oregon affecting prosecutions affected only prosecutions thereafter instituted and had no effect on those which had already been instituted although based on information.

57 Oregon, 482, affirmed.

THE facts, which involve the constitutionality under the due process clause of the Fourteenth Amendment of the "Information Act" of 1899, of the State of Oregon and the validity of a conviction thereunder, are stated in the opinion.

Mr. James E. Fenton, Mr. John F. Logan, Mr. Frank F. Freeman and *Mr. Ralph E. Moody* for plaintiff in error.

Mr. A. M. Crawford, Attorney General of the State of Oregon, *Mr. Walter H. Evans* and *Mr. Dan J. Malarkey* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

On March 9, 1908, Lem Woon, the plaintiff in error, was accused by a sworn complaint, made before a committing magistrate of the City of Portland, of the crime

of murder in the killing of Lee Tai Hoy, and, being arraigned before the magistrate, waived examination, and was held to answer the charge. On April 1, 1908, the district attorney of the proper district filed in the proper circuit court an information charging him with the crime of murder in the first degree in respect of the same homicide. The institution of the prosecution by such an information was at that time authorized by § 1 of an act of February 17, 1899, known as the "Information Law," Sess. Laws 1899, p. 99, Bellinger and Cotton's Codes, § 1258, which reads as follows:

"Hereafter it shall be lawful for the district attorney of any judicial district of this state, and it is hereby made his duty, to file in the proper circuit court an information charging any person or persons with the commission of any crime defined and made punishable by any of the laws of this state, and which shall have been committed in the county where the information is filed."

The constitution and laws of Oregon at that time in force did not require any examination, or commitment by a magistrate, as a condition precedent to the institution of a prosecution by an information filed by the district attorney, nor require any verification other than his official oath. *State* v. *Belding*, 43 Oregon, 95, 99; *State* v. *Guglielmo*, 46 Oregon, 250.

On June 12, 1908, the plaintiff in error, having pleaded not guilty, was placed on trial before the Circuit Court and a jury, and, being found guilty as charged in the indictment, was afterwards sentenced to death.

On June 1, 1908, after the filing of the information, and before his trial thereunder, § 18 of Article VII of the constitution of Oregon, under which, as it previously stood, prosecutions by information were permitted, was amended so as to provide as follows: "No person shall be charged in any circuit court with the commission of any

crime or misdemeanor defined or made punishable by any of the laws of this State, except upon indictment found by a grand jury."

Plaintiff in error appealed to the supreme court of the State, which affirmed the judgment of conviction (107 Pac. Rep. 974), and denied a petition for a rehearing (112 Pac. Rep. 427), and the case comes here under § 709, Rev. Stat., Judicial Code, § 237.

Two Federal questions were raised in the state courts and there decided adversely to the plaintiff in error and are here assigned for error.

First, that the "Information Act" of February 17, 1899, is in contravention of the "due process of law" clause of the Fourteenth Amendment of the Constitution of the United States.

Second, that the adoption of the amendment of the state constitution after the plaintiff in error was charged with the crime, operated to repeal all laws in conflict therewith immediately upon its adoption, and therefore he could not be tried, convicted, and sentenced without indictment by grand jury.

The second point was abandoned upon the argument, doubtless because it was considered to be foreclosed by the decision of this court in the recent case of *Ross* v. *Oregon*, 227 U. S. 150, 164. In that case the plaintiff in error was tried and victed in a prosecution instituted by information, and his case was pending on appeal in the state court at the time of the adoption of the constitutional amendment. He advanced the contention that the amendment had the effect of repealing the "Information Law," and made it impossible to enforce the judgment against him because of the due process of law clause. But the state court ruled (55 Oregon, 450, 479), that the amendment of the state constitution was prospective, and did not affect pending cases. This court held that this decision involved nothing more than the construction of the amend-

ment, which was a question of local law, not reviewable here.

The case of the present plaintiff in error is not distinguishable upon the ground that he had not yet been put upon trial when the amendment was adopted; for the construction placed by the Supreme Court of Oregon upon the amendment is that it had no effect upon the "Information Law" except with respect to prosecutions *thereafter instituted*. So it was held in *State* v. *Ju Nun*, 53 Oregon, 1, 9; 98 Pac. Rep. 513, 514, the court saying: "It will be observed that the amendment does not provide that a person shall not be 'tried' or 'prosecuted' for a criminal offense, except upon indictment, but simply that he shall not be charged therewith. . . . When we speak of charging a person with the commission of a crime, we ordinarily mean the commencement of the proceeding, by the filing of a written complaint or accusation, and in our opinion it was in this sense that the words were used in the constitutional amendment in question." The decision of this point in the *Ross Case* was rested by the state court upon the authority of the *Ju Nun* decision; and it was upon the same authority that in the present case the court set aside the contention that the "Information Law" was repealed by the constitutional amendment. Therefore our decision in *Ross* v. *Oregon*, 227 U. S. 150, 164, is controlling.

And so the only question is whether the Information Law is in conflict with the "due process of law" clause. This would seem to be sufficiently set at rest by repeated decisions. *Hurtado* v. *California*, 110 U. S. 516, 532, 538; *McNulty* v. *California*, 149 U. S. 645; *Hodgson* v. *Vermont*, 168 U. S. 262; *Bolln* v. *Nebraska*, 176 U. S. 83; *Maxwell* v. *Dow*, 176 U. S. 581; *Davis* v. *Burke*, 179 U. S. 399; *Dowdell* v. *United States*, 221 U. S. 325.

The Supreme Court of Oregon has upheld the validity of the Information Law in several decisions, based upon the

authority of the *Hurtado Case; State* v. *Tucker*, 36 Oregon, 291; *State* v. *Guglielmo*, 46 Oregon, 250, 251, 262; *State* v. *Ju Nun*, 53 Oregon, 1.

The distinction sought to be drawn between the present case and that of *Hurtado*, on the ground that the Oregon system did not require that the information be preceded by the arrest or preliminary examination of the accused, is untenable.

Although the plaintiff in error waived examination, we prefer not to rest upon that circumstance as a ground of decision. For if (as seems to be conceded) the preliminary examination had no lawful status under the laws of Oregon, it is not easy to see how his position was altered for the worse by his waiving such examination.

But since, as this court has so often held, the "due process of law" clause does not require the State to adopt the institution and procedure of a grand jury, we are unable to see upon what theory it can be held that an examination, or the opportunity for one, prior to the formal accusation by the district attorney, is obligatory upon the States.

The matter is so clearly settled by our previous decisions that further discussion is unnecessary.

Judgment affirmed.

(22,640)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 273.

OSCAR WILKINSON AND THOMAS J. KEMP, PLAINTIFFS IN ERROR,

vs.

OSCAR A. M. McKIMMIE AND SIMON McKIMMIE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 24, 1913.

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In the Court of Appeals of the District of Columbia.

No. 2197.

OSCAR WILKINSON et al., Appellants,
vs.
OSCAR A. MCKIMMIE.

a Supreme Court of the District of Columbia.

At Law. No. 51527.

OSCAR A. M. MCKIMMIE and SIMON MCKIMMIE, Plaintiffs,
vs.
OSCAR WILKINSON and THOMAS J. KEMP, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed April 2, 1909.

In the Supreme Court of the District of Columbia.

At Law. 51527.

OSCAR A. M. MCKIMMIE and SIMON MCKIMMIE, Plaintiffs,
vs.
GEORGE P. HORTON, JR., OSCAR WILKINSON, and THOMAS J. KEMP, Defendants.

The plaintiffs sue the defendants for money payable by the defendants to the plaintiffs for that whereas the said defendant, George P. Horton, jr., as principal, and the said defendants Oscar Wilkinson and Thomas J. Kemp, as sureties, by their certain writing obligatory under their hands and seals by the name of George P. Horton, jr., Oscar Wilkinson and Thomas J. Kemp, the date whereof

is the 10th day of January, A. D. 1906, and which writing is now shown to the Court here, acknowledged themselves to be held and firmly bound unto the plaintiffs in the full sum of Seven Thousand Dollars ($7,000.00) lawful money of the United States to be paid to the said plaintiffs, which said writing obligatory was subject to the condition that whereas the said George P. Horton, jr., had entered into a contract bearing date November 27, A. D. 1905, with the plaintiffs for the purchase of lands by the said George P. Horton, jr., of the said plaintiffs, and for the performance of certain
2 other matters and things embraced in said contract, which said contract is to be read as a part of said writing obligatory, the condition of said obligation was such that if the said principal should duly and faithfully perform and fulfil all and every of the conditions and covenants of said contract on his part to be kept and performed and should keep harmless and protect the said plaintiffs from and against all loss or damage by reason of the non-fulfillment by the said Horton of the covenants of said contract to be performed by him as aforesaid then the said obligation was to be void, otherwise to be and remain in full force and effect.

And for that the said agreement referred to in said writing obligatory provided among other things that the said plaintiffs would sell and convey to the said Horton certain real estate in said agreement described for the price of $11,500.00 to be paid in the manner therein set forth and the said Horton in consideration of the agreement on the part of the said plaintiffs agreed to pay the said purchase money in the manner set forth in said agreement and to re-convey to the said plaintiffs two lots each 16 feet 8 inches front on Brightwood Avenue to be sold and conveyed free and clear of all incumbrances, liens, claims or indebtedness and to erect on each lot a two-story brick dwelling containing six rooms and bath with cellar and steam heating apparatus, to be constructed and built from plans and specifications approved by said plaintiffs within eight months of the date of said agreement.

And the plaintiffs say that they conveyed to said Horton
3 the said real estate described in said agreement except that in lieu of conveying to him the two lots each 16 feet 8 inches front on Brightwood avenue the said plaintiffs at the request of said Horton for the purpose of saving the expense and inconvenience of reconveyance retained the title to the two such lots mutually agreed upon and selected by them and the said Horton.

And the plaintiffs further say that at the request of the said Horton and with the consent of said sureties the time for performance of said agreement was extended for a period up to January 2, 1907, and thereafter at the request of said Horton and with the consent of said sureties the time for fulfillment of said contract was further extended for a period up to May 2, 1907.

And the plaintiffs further say that although they have as aforesaid fully performed within the time required by said agreement all the obligations imposed upon them thereby yet the said Horton not regarding the said covenants and agreements hath broken the same and although often requested has wholly failed to keep and

perform said agreement in this that he has not erected on each of said lots of 16 feet 8 inches front on Brightwood avenue selected as aforesaid nor on either one of said lots such a dwelling as is required and provided for in the said agreement.

And the plaintiffs say that the said two lots by reason of the failure of said Horton to comply with his said agreement are worth, to wit, $7,000.00 less to the plaintiffs than they would have been had said houses been erected thereon as required by said agreement.

And the plaintiffs claim the sum of $7,000.00 with in-
4 terest from May 2, 1907, besides costs.

WM. E. AMBROSE,
Attorney for Plaintiffs.

Notice to Plead.

The defendants are to plead hereto on or before the 20th day exclusive of Sundays and holidays occurring after the date of service hereof, otherwise judgment.

WM. E. AMBROSE,
Att'y for Plaintiffs.

Demurrer.

Filed April 7, 1909.

* * * * * * *

The defendants, Oscar Wilkinson and Thomas J. Kemp, by Charles Poe, their attorney, as to the declaration herein say that the same is bad in substance.

CHAS. POE,
Attorney for Defendants Wilkinson and Kemp.

Memorandum.

One of the questions of law intended to be presented by the above demurrer is whether there has not been such a variation of
5 the terms of the contract and bond sued upon as to the release and discharge the defendants Oscar Wilkinson and Thomas J. Kemp from any liability thereupon.

CHAS. POE,
Attorney for Defendants Wilkinson and Kemp.

(Endorsed.)

Service of copy accepted.

WM. E. AMBROSE.

Block.
Apr. 7, 1909.

Supreme Court of the District of Columbia.

FRIDAY, *April 16th*, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

Upon consideration of the demurrer filed herein to the declaration, it is ordered that said demurrer be, and the same is hereby sustained with leave to plaintiffs to file an amended declaration herein as advised, within twenty days hereof.

6 *Amended Declaration.*

Filed May 5, 1909.

* * * * * * *

The plaintiffs by leave of the Court first obtained file this amended declaration as follows:

The plaintiffs sue the defendants for money payable by the defendants to the plaintiffs for that whereas the said defendant, George P. Horton, jr., as principal, and the said defendants Oscar Wilkinson and Thomas J. Kemp, as sureties, by their certain writing obligatory under their hands and seals by the name of Geo. P. Horton, jr., Oscar Wilkinson and T. J. Kemp, the date whereof is the 10th day of January, A. D. 1906, and which writing is now shown to the Court here, acknowledged themselves to be held and firmly bound unto the plaintiffs in the full sum of Seven Thousand Dollars ($7,000.00) lawful money of the United States to be paid to the said plaintiffs, which said writing obligatory was subject to the condition that whereas the said George P. Horton, jr., had entered into a contract bearing date November 27, A. D. 1905, with the plaintiffs for the purchase of lands by the said George P. Horton, jr., of the said plaintiffs, and for the performance of certain other matters and things embraced in said contract, which said contract is to be read as a part of said writing obligatory, the condition of said obligation was such that if the said principal should duly and faithfully perform and fulfill all and every of the conditions
7 and covenants of said contract on his part to be kept and performed and should keep harmless and protect the said plaintiffs from and against all loss or damage by reason of the nonfulfillment by the said Horton of the covenants of said contract to be performed by him as aforesaid then the said obligation was to be void, otherwise to be and remain in full force and effect.

And for that the said agreement referred to in said writing obligatory provided among other things that the said plaintiffs would sell and convey to the said Horton certain real estate in said agreement described for the price of $11,500.00 to be paid in the manner therein set forth and the said Horton in consideration of the agreement on the part of the said plaintiffs agreed to pay the said purchase money in the manner set forth in said agreement and to re-convey to the said plaintiffs two lots each 16 feet 8 inches front on Brightwood Avenue to be sold and conveyed free and clear of all incumbrances, liens, claims or indebtedness and to erect on each lot a two-story brick dwelling containing six rooms and bath with cellar and steam heating apparatus, to be constructed and built from plans and specifications approved by said plaintiffs within eight months of the date of said agreement.

And the plaintiffs say that they conveyed to said Horton the said real estate described in said agreement except that in lieu of conveying to him the two lots each 16 feet 8 inches front on Brightwood avenue the said plaintiffs at the request of said Horton for the purpose of saving the expense and inconvenience of reconveyance retained the title to the two such lots mutually agreed upon
8 and selected by them and the said Horton.

And the plaintiffs further say that at the request of the said Horton and with the written consent of said sureties the time for performance of said agreement was extended for a period up to January 2, 1907, and thereafter at the request of said Horton and with the written consent of said sureties the time for fulfillment of said contract was further extended for a period up to the 2nd day of May, 1907, and the plaintiffs further say that prior to the making of said extensions the said sureties had actual notice of the fact that the said two lots each fronting 16 feet 8 inches on Brightwood Avenue had not been conveyed by plaintiff to said Horton and with such actual knowledge not only assented to the extensions aforesaid but expressly affirmed their liability under the said writing obligatory dated January 10, 1906.

And the plaintiffs further say that although they have as aforesaid fully performed within the time required by said agreement as extended as aforesaid all of the obligations imposed upon them thereby yet the said Horton not regarding the said covenants and agreements hath broken the same and although often requested has wholly failed to keep and perform said agreement in this that he has not erected on each of said lots of 16 feet 8 inches front on Brightwood Avenue selected as aforesaid nor on either one of said lots such a dwelling as is required and provided for in the said agreement.

And the plaintiffs say that the said two lots by reason of the failure of said Horton to comply with his said agreement are worth,
9 to wit, $7,000 less to the plaintiffs than they would have been had said houses been erected thereon as required by said agreement.

And the plaintiffs claim the sum of $7,000.00 with interest from May 2, 1907, besides costs

W. E. AMBROSE,
Attorney for Plaintiffs.

Notice to Plead.

The defendants are to plead hereto on or before the 20th day exclusive of Sundays and legal holidays occurring after the date of service hereto, otherwise judgment.

WM. E. AMBROSE,
Att'y for Plaintiffs.

Pleas to Amended Declaration.

Filed June 3, 1909.

* * * * * * *

The defendants, Oscar Wilkinson and Thomas J. Kemp, by Charles Poe, their attorney, for a first plea to the said amended declaration, say that they never were indebted as therein alleged.

And for a second plea to said declaration the said defendants, by their said attorney, say that the defendant, George P. Horton, Jr., did well and truly carry out and perform all the terms and
10 conditions of the agreement and writing obligatory in said declaration mentioned.

And for a third plea the said defendants by their said attorney, say that the said plaintiffs were not injured or damnified by the alleged failure of said George P. Horton, Jr. to carry out and fully perform the terms and conditions of the said agreement and said writing obligatory in said declaration mentioned.

And for a fourth plea the said defendants, by their said attorney, say that they never had notice of the fact that the said two lots each fronting 16 feet 8 inches on Brightwood Avenue had not been conveyed by the plaintiffs to said Horton and never assented to any extensions as set forth in said declaration or expressly or otherwise affirmed their liability under the said writing obligatory dated January 10, 1906.

And for a fifth plea said defendants, by their said attorney, say that they never assented to the alteration or modification of any of the terms or conditions of the agreement or writing obligatory in said declaration mentioned.

CHAS. POE,
Attorney for Defendants Wilkinson and Kemp.

11 *Joinder of Issue.*

Filed June 29, 1909.

* * * * * * *

The plaintiffs join issue on the pleas of Thomas J. Kemp and Oscar Wilkinson to the amended declaration.

WM. E. AMBROSE,
Attorney for Plaintiffs.

Order for Discontinuance as to Horton.

Filed March 14, 1910.

* * * * * * *

The Clerk of said Court will enter this cause discontinued as against George P. Horton Jr.

WILLIAM E. AMBROSE,
JOHN RIDOUT,
Attorneys for Pl'ffs.

Memorandum.

April 13, 1910.—Verdict for Plaintiffs for $5,736.72.

12 *Interrogatories Answered by the Jury.*

Filed April 13, 1910.

* * * * * * *

Question 1. Did the Defendants sign the extension paper dated July 27th 1906?

Answer. Yes.

Question 2. If they did sign it, did they at that time know that the two lots had not been conveyed to Horton?

Answer. Yes.

Question 3. Did the Defendants sign the extension paper dated November 27th 1906?

Answer. Yes.

Question 4. If they did sign it, did they at that time know that the two lots had not been conveyed to Horton?

Answer. Yes.

WILLIAM T. WHELAN,
Foreman.

Motion for New Trial.

Filed April 15, 1910.

* * * * * * *

Now come the defendants, by their attorney, and move the Court to grant a new trial of the issues herein, and assign the following grounds for this motion:

13 1. Because the verdict of the Jury is against the evidence;

2. Because the Court erred in submitting the issues joined upon the pleadings herein to the Jury;

3. Because of other errors of law committed by the trial Judge at the trial of said issues.

CHARLES POE,
W. L. FURBERSHAW,
Attorneys for Defendants.

To Wm. E. Ambrose and John Ridout, Esqs., Attorneys for Plaintiffs:

You are hereby notified that the above motion will be called for hearing before his Honor, Justice Wright, on Friday, April 22nd, at 10:00 o'clock, A. M., or as soon thereafter as counsel can be heard.

CHAS. POE,
W. L. FURBERSHAW,
Attorneys for Defendants.

Motion in Arrest of Judgment.

Filed April 15, 1910.

* * * * * * *

Now come the defendants, by their said attorney, and move
14 the Court in arrest of judgment upon the verdict of the Jury heretofore entered herein and assign the following grounds for their said motion:

1st. Because, though the bond sued on as the cause of action is under the statutes in such case made and provided a joint and several bond, the action herein is prosecuted against only two of the three joint and several obligors therein named;

2nd. Because the record shows that the plaintiffs have discontinued this action against one of three joint and several obligors and continued it against the remaining two only;

3rd. Because, although one of three joint and several obligors has died since the institution of this suit, the plaintiffs herein have failed to make the personal representative of said deceased joint and several obligor a party defendant to this suit;

4th. Because the declaration herein, upon its face, shows that the bond sued upon was altered and amended by parol agreement of the parties thereto subsequent to its execution under seal and no recovery can be had, nor judgment entered thereupon, upon the pleadings in this cause; and,

5th. For other defects and irregularities apparent upon the face of the record.

CHAS. POE,
W. L. FURBERSHAW
Attorneys for Defendants.

15 To Wm. E. Ambrose and John Ridout, Esqs., Attorneys for Plaintiffs.

GENTLEMEN: You are hereby notified that the above motion will be called for hearing before his Honor, Justice Wright, on Friday, April 22nd, 1900, at 10:00 o'clock, A. M., or as soon thereafter as counsel can be heard.

CHARLES POE,
W. L. FURBERSHAW,
Attorneys for Defendants.

Supreme Court of the District of Columbia.

SATURDAY, *May* 7, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

This cause coming on to be heard upon the motions of defendants Oscar Wilkinson and Thomas J. Kemp for a new trial and

in arrest of judgment, filed herein, the same having heretofore been argued and submitted to the Court, it is considered that said motions be and they hereby are overruled, and judgment on verdict ordered.

Therefore it is considered that the plaintiffs recover against the defendants Oscar Wilkinson and Thomas J. Kemp, the sum of Five thousand, seven hundred, and thirty-six and 72/100 dollars
16 ($5,736.72) with interest thereon from this date, being the money payable by said defendants Oscar Wilkinson and Thomas J. Kemp to the plaintiffs by reason of the premises, together with the costs of suit, to be taxed by the Clerk, and have execution thereof.

Memoranda.

May 9, 1910—Appeal noted in open Court.
May 16, 1910—Appeal bond approved and filed.
June 3, 1910—Time in which to file Transcript of Record in Court of Appeals extended to, and including, August 1, 1910.

Directions to Clerk for Preparation of Transcript of Record.

Filed June 4, 1910.

* * * * * * *

Mr. YOUNG:

In making up the Transcript of Record on appeal herein you will include the following, to wit:

17

1909.
April 2nd. Declaration.
" 7th. Demurrer.
" 16th. Judgment sustaining demurrer.
May 5th. Amended Declaration.
June 3rd. Pleas to amended declaration.
" 29th. Joinder of issue.
1910.
Mar. 14th. Order discontinuing cause as to Horton.
Apl. 13th. Verdict.
Apl. 13th. Interrogatories to Jury and answers.
" 15th. Motion for new trial.
" 15th. Motion in arrest of judgment.
May 7th. Judgment.
May 9th. Appeal prayed and allowed. (mem.)
May 16th. Approved Bond for costs. (mem.)
Bill of exceptions.
June 3rd. Order extending time to file transcript.
June 4th. This order.

CHAS. POE,
Att'y for Wilkinson & Kemp.

18 Supreme Court of the District of Columbia.

MONDAY, *June* 6, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Now come here the defendants Oscar Wilkinson and Thomas J. Kemp by their Attorney and pray the Court to sign, seal and make part of the record, their bill of exceptions taken during the trial of this cause (heretofore submitted) now for then, which is accordingly done.

Bill of Exceptions.

Filed June 6, 1910.

* * * * * * *

Be it remembered, that, at the trial of this cause, in the Supreme Court of the District of Columbia, before the Honorable Daniel Thew Wright, and a jury, the plaintiffs, to maintain the issues on their part joined between themselves and the defendants Wilkinson and Kemp offered in evidence the following bond and the agreement therein referred to and made part thereof; which are in the following words and figures:

Know all men by these presents, that we, George P. Horton, Junior, principal, Oscar Wilkinson and Thomas J. Kemp, sureties, are held and firmly bound unto Oscar A. M. McKimmie
19 and Simon McKimmie in the full sum of Seven Thousand Dollars ($7000.00) lawful money of the United States of America, to be paid to the said obligees, their certain attorney, executors, administrators, successors or assigns; to which payment well and truly to be made, we do hereby jointly and severally, bind and obligate ourselves, our heirs, executors, administrators and successors and each and every one of them firmly by these presents.

Sealed with our seals and dated the 10th day of January, A. D., 1906.

Whereas, George P. Horton, Junior, the principal herein, entered into a contract bearing date November 27th A. D., 1905, with Oscar A. M. McKimmie and Simon McKimmie, the obligees herein, for the purchase of lands by the said George P. Horton, Junior, of the said obligees, and for the performances of certain other matters and things embraced in said contract, which said contract is annexed hereto and is to be read as a part hereof, and,

Whereas, the said Oscar Wilkinson and Thomas J. Kemp, are desirous of securing to the obligees a strict compliance with the covenants of said contract, to be kept and performed upon the part of said George P. Horton, Junior, for good and sufficient considerations passing from the obligees to them.

Now the conditions of this obligation is such that if the said

principal shall duly and faithfully perform and fulfill all and
20 every the conditions and covenants of his contract hereinbefore mentioned on his part to be kept and performed and shall keep harmless and protect the said obligees from and against all loss or damage by reason of the non-fulfillment by the said principal of the covenants of said contract to be performed by him as aforesaid and also against actual losses by reason of any and all claims, defects, errors, obligations, liens and encumbrances arising from the non-fulfillment by the said principal of said covenants, then this obligation to be void otherwise to be and remain in full force and effect.

And upon a further condition that if any liability shall accrue on the part of the sureties herein by reason of this obligation under settlement of the same by the said sureties in accordance with the tenor hereof the said sureties shall be subrogated to all of the rights and remedies which the obligees would have had against the principal, in this obligation, or any other person the obligees are bound by acceptance of this obligation to authorize and permit the sureties herein to use the names of the said obligees for the recovery thereof, upon condition, nevertheless, that said obligees shall be saved harmless from all costs, charges, expenses and losses incident thereto.

In testimony thereof we have hereunto set our hands and seals this 10th day of January, A. D. 1906.

GEO. P. HORTON. [SEAL.]
OSCAR WILKINSON. [SEAL.]
T. J. KEMP. [SEAL.]

21 Signed, sealed and delivered in the presence of
S. A. TERRY.

DISTRICT OF COLUMBIA, *ss:*

I, S. A. Terry, a Notary Public in and for the District of Columbia do hereby certify that George P. Horton, Junior, Oscar Wilkinson and Thomas J. Kemp parties to a certain bond bearing date on the 10th day of January, A. D. 1906, and hereto annexed, personally appeared before me in said District the said George P. Horton, Junior, Oscar Wilkinson and Thomas J. Kemp, being personally well known to me as the persons who executed the said bond and acknowledged the same to be their act and deed.

Given under my hand and seal this 10th day of January, 1906.

S. A. TERRY,
[SEAL NOTARIAL.] *Notary Public, D. C.*

Agreement.

This agreement made this Twenty-seventh day of November, A. D., 1906, by and between Oscar A. M. McKimmie and Simon McKimmie, parties of the first part and George P. Horton, Jr., party of the second part, all of the District of Columbia.

Witnesseth, That in consideration of the covenants herein-
22 after to be performed by the party of the second part, and further, the sum of Ten Dollars ($10.00), in hand paid by

the party of the second to the parties of the first part, receipt whereof is hereby acknowledged by the parties of the first part, the parties of the first part hereby covenant and agree to sell and convey to said parties of the second part all those pieces and parcels of land known as lots 27, 28, 29 and 30 in Block 9 of Todd and Brown's Subdivision of Mount Pleasant and Pleasant Plains, in said District of Columbia, at and for the price and sum of Eleven Thousand Five Hundred Dollars ($11,500.00) and upon the terms and conditions hereinafter stated.

In consideration of the said conveyance to be made and further the sum of Ten Dollars ($10.00) paid as aforesaid the said party of the second part covenants and agrees to purchase said land at and for the price and sum stated $11,500 upon the following terms and conditions, to-wit:—Assume and pay present indebtedness aggregating Three Thousand Dollars ($3,000), now secured by certain Deeds of Trust on said land, to pay One Thousand Dollars ($1,000) in cash delivery of Deed to said land; to re-convey to said parties of the first part two (2) lots each sixteen (16) feet eight (8) inches front on Brightwood Avenue (part of the land above described) free and clear of all incumbrances, liens, claims or indebtedness and to erect on each lot a two (2) story brick dwelling containing six rooms and bath, with cellar and steam heating apparatus, to be constructed and completed from plans and specifications
23 approved by parties of the first part within 8 months from the date hereof, for which construction and completion clear of mechanics liens or other incumbrances said party of the second part shall furnish a sufficient and satisfactory bond to the parties of the first part, and for the balance of said purchase price, Five Hundred Dollars ($500) the said party of the second part shall give his two (2) notes each for the sum of Two Hundred and Fifty Dollars ($250) with interest at six (6) per cent payable on or before one (1) year after date and secured by Second Deed of Trust upon two lots in said tract of land facing Brightwood Avenue upon which he is to erect houses similar to those herein described.

The said houses contracted for to be constructed as aforesaid, shall be delivered upon their completion to the parties of the first part as their property in fee simple and shall be free and clear of all incumbrances or liens.

It being mutually agreed that the title to said land shall be good of record or this Agreement void; parties of the first part to adjust all taxes and interest to date of delivery of Deed. Settlement to be made within thirty (30) days from the date hereof; delay thereafter at cost of delinquent party.

Witness our hands and seals this 27th day of November A. D., 1905.

OSCAR A. M. McKIMMIE. [SEAL.]
SIMON McKIMMIE. [SEAL.]
GEORGE P. HORTON, JR. [SEAL.]

Witness:
FERD. ESPEY.

24 DISTRICT OF COLUMBIA, *To-wit:*

I, Ferdinand Espey a Notary Public in and for the District of Columbia do hereby certify that Oscar A. M. McKimmie, Simon McKimmie and George P. Horton, Jr., parties to a certain Agreement bearing date on the 27th day of Nov. 1905, and hereto annexed, personally appeared before me in said District, the said Oscar A. M. McKimmie, Simon McKimmie and George P. Horton, Jr., being personally well known to me as the persons who executed the said agreement and acknowledged the same to be their act and deed.

Given under my hand and seal this 27th day of Nov. 1905.

[SEAL.] FERDINAND ESPEY,
Notary Public, D. C.

Whereupon the said defendants, Wilkinson and Kemp, by their attorney, admitted the execution and delivery of the said bond and agreement, but objected to their competency or admissibility in evidence under the amended declaration and pleadings in this case, said amended declaration, as contended by their said attorney being in form, neither in debt, covenant or assumpsit; and on the further ground that it appeared upon the face of said amended declaration that there had been a material variation of the terms of the bond and agreement (a part of said bond) by which the plaintiffs were to convey to George P. Horton, the principal obligor in said bond and agreement mentioned, less than the entire tract of land in said bond and agreement contracted to be conveyed, and, though
25 said variation of the said bond and agreement constituted a material alteration of the terms thereof, it did not appear upon the face of said amended declaration whether said variation of the terms of said bond and agreement was under seal or by parol, but the Court held that the amended declaration was sufficient and also that the distinctions between the various forms of action no longer existed in the District of Columbia and that any plain statement of a case by a plaintiff was sufficient and that the amended declaration in this case authorized the admission in evidence of said bond and agreement; and the Court held further as matter of law that the variation of the terms of the bond and agreement sued on by which the plaintiffs arranged with the principal obligor therein to convey to him less than the entire tract of ground in said bond and agreement mentioned and agreed to be conveyed to him, and the actual failure to convey to him the two lots in the amended declaration mentioned was not such a material variation of the terms of said bond and agreement as to discharge the defendants, Wilkinson and Kemp, from their obligation thereupon as sureties; and permitted said bond and agreement to be read in evidence to the jury, to which action of the Court in overruling their said objection to the competency or admissibility of said bond and agreement as evidence the defendants, Wilkinson and Kemp, by their attorney, then and there excepted, and prayed the Court to sign their bill of exceptions.

And the plaintiffs, further to maintain the issues on their part

joined against the said defendants, Wilkinson and Kemp,
26 called as a witness on their behalf the defendant Thomas J. Kemp and exhibited to him the two papers following, purporting to be extensions of the time within which the said George P. Horton, Jr., the principal obligor in said bond and agreement mentioned, was to fulfill the terms and conditions of the said agreement, which said two extensions are in the words and figures following,—

Know all men by these presents: That we, Thomas J. Kemp and Oscar Wilkinson, parties to a certain bond bearing date January 10th, 1906, and executed by us and George P. Horton, Junior, conditioned upon the faithful performance by the said George P. Horton, Jr., of a certain contract with Oscar A. M. McKimmie and Simon McKimmie, said contract bearing date November 27th, 1905, do for and in consideration of one dollar to us in hand paid by the said Oscar A. M. McKimmie and Simon McKimmie, bind ourselves our heirs and executors, jointly with the said George P. Horton, Junior, in an affirmance of said bond and we for ourselves our heirs and assigns together with the principal of said bond, George P. Horton, Junior, do waive any and all rights which we might have had or hereafter may have by reason of an extension of the time for fulfillment of the contract hereinbefore mentioned on the part of the said George P. Horton, Junior, and affirm said bond up to and including the period from the 27th day of July A. D., 1906, to January 2nd, 1907.

The consideration for this obligation upon our part is the extension of time granted by the said Oscar A. M. McKimmie and
27 Simon McKimmie of the contractural limitation for the performance of the contract hereinbefore set forth for the completion of which in accordance with the terms of said contract, we and each of us are jointly and severally liable.

In testimony whereof we have hereunto set our hands and seals this 27th day of July A. D. 1906.

GEO. P. HORTON, Jr. [SEAL.]
THOMAS J. KEMP. [SEAL.]
OSCAR WILKINSON. [SEAL.]

Signed, sealed and delivered in my presence.

GEO. E. TERRY,
Notary Public, D. C.

Know all men by these presents: That we, Thomas J. Kemp and Oscar Wilkinson, parties to a certain bond bearing date January 10th, 1906, and executed by us and George P. Horton, Junior, conditioned upon the faithful performance by the said George P. Horton, Jr., of a certain contract with Oscar A. M. McKimmie and Simon McKimmie, said contract bearing date November 27th, 1905, do for and in consideration of one dollar to us in hand paid by the said Oscar A. M. McKimmie and Simon McKimmie, bind ourselves our heirs and executors, jointly with the said George P. Horton, Junior, in an affirmance of said bond and we for ourselves, our

heirs and assigns together with the principal of said bond, George P. Horton, Junior, do waive any and all rights which we might have had or hereafter may have by reason of an extension of the time for fulfillment of the contract hereinbefore mentioned on the
28 part of the said George P. Horton, Junior, and affirm said bond up to and including the period from the 27th day of July A. D., 1906, to May 2nd, 1907.

The consideration for this obligation upon our part is the extension of time granted by the said Oscar A. M. McKimmie and Simon McKimmie of the *contractural* limitation for the performance of the contract hereinbefore set forth for the completion of which in accordance with the terms of said contract, we and each of us are jointly and severally liable.

In testimony whereof we have hereunto set our hands and seals this 27th day of November A. D. 1906.

GEO. P. HORTON, Jr. [SEAL.]
T. J. KEMP, [SEAL.]
OSCAR WILKINSON. [SEAL.]

Signed, sealed and delivered in the presence of
[SEAL.]
GEO. E. TERRY,
Notary Public, D. C.

And asked him whether he signed his name to said papers, and the said Kemp testified that, while the signatures looked like his he had no recollection of ever signing either of said papers, and that he had never signed any paper before George E. Terry, Notary Public, that he never signed his name "Thomas J. Kemp," but invariably signed it "T. J. Kemp."

And the plaintiffs thereupon called the defendant Oscar Wilkinson, and asked him as to the genuineness of his signatures to said two papers, purporting to be extensions and hereinbefore
29 fully set forth, and said Wilkinson testified that he had no recollection of signing either of said papers, that one of said papers looked like his genuine signature, to wit, the paper bearing date 27th of July, 1906, while that bearing date November 27th, 1906 did not look at all like his signature. Witness further testified that he never signed any paper with George E. Terry, Notary Public, as a witness, though he had signed papers witnessed by Seth A. Terry, Notary Public as witness.

Whereupon the said plaintiffs offered said two papers in evidence to which offer the said defendants, Wilkinson and Kemp, by their attorney, objected but the Court overruled their objection and permitted said papers to be read in evidence to the jury; to which action of the Court in overruling their said objection and permitting said two papers to be read to the jury, the said defendants then and there excepted, and prayed the Court to sign their bill of exceptions.

And the plaintiffs further to maintain the issues on their part joined with the defendants Wilkinson and Kemp, called as a witness WILLIAM E. AMBROSE, who testified that some time prior to the 7th

of March, 1907, at a conference at his office at which were present himself, the two plaintiffs, Herman W. Van Senden, the two defendants Wilkinson and Kemp, and Charles Poe, which conference was called by him because of George P. Horton's insolvency, the contract and bond in question were then in the office of the Recorder of Deeds, and that it was stated by some one that it was a lucky thing that the plaintiffs had not conveyed the two lots in question to Hor-
30 ton, that there was some discussion of that subject on that occasion about the conveyance of these two lots, but that he could not, however, state the nature of the discussion, as he did not remember the details.

Thereupon OSCAR A. M. MCKIMMIE, one of the plaintiffs, was called as a witness on behalf of the plaintiffs, and testified the plaintiffs owned the lots in question that some time after the execution of the bond, witness being unable to state either the month or day, but he knew it was some time prior to the limit of the original contract, he had several conversations with Dr. Wilkinson. Witness asked Wilkinson whether Horton was engaged in the erection of the building, as to the exact time, witness could not say. Could not say when he saw Dr. Kemp, knew he saw him concerning other business. Did not have conversation about this matter with Dr. Kemp, but saw Dr. Wilkinson every day or so, and the matter of these buildings was the subject of some of our conversations. Do not remember the details, but inquiry was made as to the progress that the principal in the contract was making. Dr. Wilkinson made the inquiry. It was before the expiration of the eight month period. Thinks he had a discussion with Dr. Kemp. Does not remember the time and cannot recall it. Was present at the conference at Mr. Ambrose's office. Conversation was on the question of what if anything Horton had done in performance of this contract before conveying to Van Senden. He did not build a house on each of the two lots. After a space of time the building contract was discussed very fully. Q. "Was anything said about the fact that these
31 two lots were not conveyed." A. "Statements were made by several persons present, and it was understood that they had not been conveyed." On cross-examination witness testified "We conveyed all the property, with the exception of two lots, which at Mr. Horton's suggestion we did not convey to him." "I said (in examination in chief) that so far as I knew positively, I am not sure that I ever had any permission from Dr. Kemp to exclude these two lots from the conveyance." Q. "Did you ever see Kemp between the date of the execution of the contract and the time you saw him in Mr. Ambrose's office in January, 1907." A. "I cannot recall, I saw him I know, but am unable to recall the place or time." Q. "Where did you ever converse with Dr. Wilkinson." A. "Dr. Wilkinson's office is on L Street near 14th, and during the Spring of 1906, at or near,—within the period of the original contract. I cannot give the language or date or place or time of the conversations with Dr. Wilkinson. I am not willing to swear to the statements he made." On redirect examination witness identified certain plans and specifi-

cations for the erection of seventeen houses by George P. Horton, Jr., said plans and specifications having been prepared by Nicholas T. Haller, an Architect, and on re-cross examination testified that he conversed about leaving out two lots. Remembers that that subject was discussed in detail, two lots joining. "I never had any conversation with Kemp about the two lots, not until the full conversation in Ambrose's office." Witness also testified on re-direct examination as to the value of said two lots with and without a house erected thereupon in accordance with the plans and specifications referred to.

32 Witness was thereupon made a witness for the defendants Wilkinson and Kemp, and was asked the following question, "Did you subdivide the lots mentioned in the agreement between you and Horton without consulting Kemp or Wilkinson?" to which question the plaintiffs by their counsel objected and the Court sustained their objection, to which action of the Court in sustaining said objection and refusing to permit the witness to answer said question, the defendants by their counsel then and there objected and prayed the court to sign this their bill of exceptions.

NICHOLAS T. HALLER, a witness for the plaintiffs testified that he was an Architect and drew the plans and specifications for these houses for George P. Horton who was to build them, that Horton never built them, never stuck a spade in the ground, that defendant Wilkinson was in his office frequently, some times as much as four times a week. Wilkinson knew that they (the plaintiffs) were holding the two lots and made no objection to the same. Never talked with Kemp about this matter, except once in Ford and Graham's Lunch Room, in the spring of 1906. Kemp was very anxious about Horton building these two houses for the McKimmies. Witness further testified as to the value of the two houses if built, placing the value of the two houses at Five Thousand Dollars ($5000) and their fair rental value at $25.00 a month apiece. On cross-examination witness stated that Wilkinson said that Dr. Kemp would look out for the McKimmies, and that they got what they were paying for it. McKimmies had given fifteen (15) lots for these two houses. Kemp simply urged him to build these houses. Kemp never

33 had conversation about these two lots. Witness also testified that he had had a quarrel with Wilkinson. Simon McKimmie, one of the plaintiffs testified that he was present at the conference at Ambrose's office and that there was some conversation there about the two lots, but he could not recall what it was. Everybody seemed to think it was fortunate that the two lots had not been conveyed to Horton. Also testified as to who were present at that conversation. Never had any conversation with Dr. Kemp on the subject of the two lots and cannot recall the time or place or language of any conversation with Dr. Wilkinson upon that subject. Did not get the two extension papers from Kemp or Wilkinson or from Terry, but got them from Horton. Was not present at the execution of either of these papers by Kemp or Wilkinson.

Whereupon the defendants Wilkinson and Kemp to maintain the issues on their part joined, called Dr. T. J. KEMP, who testified that

he knew the McKimmies. Knew George P. Horton, Jr. First met McKimmies in Ambrose's office in January, 1907. Never knew or talked with them about this transaction prior to that. Never talked with the McKimmies about these two lots. Never met Mr. Haller in Ford and Graham's in my life. Am positive about it. Q. "When did you first learn that these two lots had not in point of fact been conveyed by the McKimmies to Horton?" A. "At the time you (Mr. Poe) called my attention to this fact. Mr. George P. Hoover was my attorney before that time. It was when I brought you the declaration in this case that you told me that the McKimmies had never conveyed these two lots to Horton, and that was the first time I ever heard of it—heard the two lots had not been con-
34 veyed. Remembered the conference at Ambrose's office in January 1907. There was no conversation there about the two lots. We were called there because Horton had failed to keep his contracts, had fallen down on all his building contracts, and had made a deed to a man named Van Senden, of these lots which the McKimmies had deeded to him, and there was some talk about throwing Horton into bankruptcy, but there was no conversation about these two lots. I did receive on March 9th or 10th, 1907 the following letter written by William E. Ambrose to me.

MARCH 7TH, 1907.

Drs. Oscar Wilkinson & Thomas J. Kemp, Washington, D. C.

DEAR SIRS: I beg to notify you as counsel for Messrs. Oscar A. M. McKimmie and Simon McKimmie, and duly authorized by them, George P. Horton, Jr., one of the parties to a contract bearing date November 27th, 1905, for the performance of which contract, you and each of you, became sureties under a bond for the performance of said contract executed the 10th day of January, A. D., 1906, has not performed, or attempted to perform, his said contract, or any part thereof, or any of the covenants or agreements by him made or contained therein, and that the time for the performance of said contract, together with the extensions therein granted to him, and acceded to by you, has about elapsed. We therefore demand that the covenants of said contract be performed by you in
35 event of failure upon the part of the principal.

This letter is in pursuance of previous conversations had relative to this matter at various times.

Very respectfully, WM. E. AMBROSE.

mailed on the 9th day of March, 1907.

Never replied to it. Did not sign the extensions, always sign my name "T. J. Kemp". Never signed a paper before George E. Terry in my life. Do not believe it is Wilkinson's handwriting on these two papers,—do not believe it is his signature.

On cross-examination defendant Kemp swore the signature "Thomas J. Kemp" to the extension, dated July 27 1906 I did not sign, the one dated Nov. 27 1906 I did sign. Never signed any such paper before George E. Perry, Notary Public. Never signed

any paper before George E. Perry Notary Public. Told Horton I would not sign any more papers of any description for him. Did sign the Bond sued on before S. A. Terry, Notary Public. Oscar Wilkinson, one of the defendants, swore he had known Oscar McKimmie about six years, does not believe he knew Simon McKimmie before some time in 1906. Signed the bond for Horton. Never had any conversation with the McKimmies about the case after the signing of the bond. Was in Haller's office very frequently in 1905, but never discussed the matter of the transfer of these lots with him, nor did witness ever see the specifications or the plans. Never discussed it because I did not know the lots were not transferred. Asked as to signing the extension papers, witness testified "This one (indicating the paper dated 27th of July, 1906) the signature is like mine. I have no recollection of signing it. That signature looks like my signature. As to the second, (indicating the paper dated November 27th, 1906) I have no recollection and would not acknowledge it as my signature." Witness here examined papers and explained difference in signatures, and concluded by stating "those signatures speak for themselves."

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On cross-examination witness stated "the conference in Mr. Ambrose's office was primarily to see about putting Horton into bankruptcy. Did not remember any conversation there about the two lots. Horton never made any request of the witness to sign the extension papers." Q. "Did you or not sign these papers". A. "I do not remember signing either one".

Herman W. Van Senden witness for defendant testified that Kemp, Wilkinson, the McKimmies, Ambrose, Poe and himself were present at the meeting in Ambrose's office, which was very informal. Witness came there at the request in writing of Mr. Ambrose. The fact that Horton had conveyed fifteen lots to me provoked the meeting. Did not recollect that anything was said about the two lots. Horton deeded the fifteen lots to me as security for debt. I afterwards bought the lots in under a sale made under a first Deed of Trust. Was notified of the meeting as one of Horton's creditors. The subject was Horton's delinquency on the Kenyon Street contract. Charles Poe testified that he was at the meeting at Ambrose's office, and that the complaint there was that Van Senden had taken a Deed to the lots that the McKimmies had conveyed to Horton. Could recall no suggestions that two of the lots had been omitted from the conveyance. On cross-examination testified that he was present there wholly in the interest of Van Senden whose attorney he was at that time

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In rebuttal the plaintiffs offered in evidence the following paper being a certified copy of a deed from them and their wives to George P. Horton, Jr., conveying to him fifteen (15) lots of ground therein described.

Deed.

Recorded Jan. 11th, 1906, 9:01 A. M.

Liber 2991, Folio 9 et seq.

Oscar A. M. McKimmie et ux. et al.
to
George P. Horton, Jr.

This deed, made this 27th day of December in the year one thousand nine hundred and five by and between Oscar A. M. McKimmie and Rebekah C. McKimmie, his wife, and Simon McKimmie and Nannie J. McKimmie, his wife, of the District of Columbia, parties of the first part and George P. Horton, Junior, of the same place. Witnesseth That in consideration of Ten ($10.00) Dollars, the parties of the first part do grant unto the party of the second part, in fee simple, all those pieces or parcels of land in the County of Washington, District of Columbia, described as follows, to wit: Lots numbered thirty nine (39) to Fifty-two (52) both inclusive, and lots numbered fifty-five (55) and Fifty-six (56) in Oscar A. M. Kimmie and others' subdivision of lots in Block numbered
38 nine (9) of Todd and Brown's subdivision of parts of Mount Pleasant and Pleasant Plains as per plat of said first subdivision recorded in Book County No. 20, page 105, in the office of the surveyor for the District of Columbia, together with the improvements rights, privileges and appurtenances to the same belonging. And the said parties of the first part covenant that they will warrant specially the property hereby conveyed and that they will execute such further assurances of said land as may be requisite. Witness our hands and seals the day and year hereinbefore written.

OSCAR A. M. McKIMMIE. [SEAL.]
REBEKAH C. McKIMMIE. [SEAL.]
SIMON McKIMMIE. [SEAL.]
NANNIE J. McKIMMIE. [SEAL.]

In presence of—
J. ALF. HAYWARD.

DISTRICT OF COLUMBIA, *To wit:*

I, J. Alf. Hayward, a Notary Public in and for the District of Columbia, do hereby certify that Oscar A. M. McKimmie and Rebekah C. McKimmie, his wife, and Simon McKimmie and Nannie J. McKimmie, his wife, parties to a certain Deed bearing date on the 27th day of December, 1905, and hereto annexed, personally appeared before me in said District, the said Oscar A. M. McKimmie, Rebekah C. McKimmie, Simon McKimmie and Nannie J. McKimmie, being personally well known to me as the persons who executed the said Deed, and acknowledged the same to be their act and deed.

Given under my hand and seal this 27th day of December, 1905.

J. ALF. HAYWARD,
Notary Public.

[NOTARIAL SEAL.]

39 OFFICE OF THE RECORDER OF DEEDS,
DISTRICT OF COLUMBIA.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber 2991 folio 9 et seq., one of the Land Records of the District of Columbia.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office this 28th day of March, A. D. 1910.

[SEAL.] *Deputy Recorder of Deeds, D. C.*

And thereupon both parties rested their case, the aforegoing being all the evidence in the case. It being stipulated and agreed by and between said parties that the defendant George P. Horton, Jr., departed this life after he had been served with the summons in this case to appear as a defendant therein, that he never filed any plea or made any defense thereto, and that no issue ever was joined between him and the plaintiffs herein, and that on or about the 19th day of March, 1910, an order was filed herein by the plaintiffs through their attorney discontinuing this action against the said George P. Horton, Jr., and that no proceedings had been taken in this cause to make the personal representative of said deceased, George P. Horton, Jr., a party defendant to said cause.

Whereupon the defendants offered the four following prayers for instruction to the jury, the first three of which were re-
40 fused by the Court generally, the fourth being refused on the distinct ground that there was no material variation from the terms of the agreement and bond sued upon sufficient to discharge the defendants, Wilkinson and Kemp, from their obligation as sureties thereupon because of the failure by the plaintiffs to convey to Horton the two lots referred to in the amended declaration and the evidence in this cause, to which rulings of the Court in refusing their said four prayers for instructions to the jury, the defendants then and there excepted and prayed the Court to sign their bill of exceptions. Said prayers were in the following language.

Defendants' First Prayer.

The defendants pray the Court to instruct the Jury, that, upon the declaration in this case, the plaintiffs cannot recover against the defendants on the bond and agreement mentioned in the said declaration and offered in evidence, and their verdict, therefore must be for the defendants.

Defendants' Second Prayer.

The defendants pray the Court to instruct the Jury that their verdict must be for the defendant because there is no evidence legally sufficient to prove that the plaintiffs ever had a good title to the property mentioned in the bond and agreement sued on.

Defendants' Third Prayer.

The defendants pray the Court to instruct the Jury that their verdict must be for the defendants because there is no evi-
41 dence that the defendants or either of them ever authorized the plaintiffs to subdivide the property mentioned in the agreement and bond sued on before conveying the same to George P. Horton, Jr.

Defendants' Fourth Prayer.

The Court instructs the Jury to find for the defendants because there is no evidence legally sufficient to prove that the defendants or either of them authorized or consented to the convevance by the plaintiffs to George P. Horton, Jr., of less than the whole of the property mentioned in the agreement and bond sued on.

And thereupon the Court charged the Jury in the following language:

Charge to the Jury.

The COURT: Gentlemen of the jury, the plaintiffs are suing the defendants Kemp and Wilkinson as sureties upon Horton's bond. This was the situation so far as the parties agree about it; Horton had made a contract with the plaintiffs, McKimmie Brothers, whereby he agreed to place two houses, one house on each of two lots, the two lots that there has been controversy here before you, over their not having been conveyed to Horton under the contract. It is conceded that Horton failed to carry out that agreement with the McKimmie Brothers, that is, that he failed to construct either of those two houses that he agreed to construct in his contract, on either of the lots; and the parties and all of them further agree
42 that the two defendants Kemp and Wilkinson had gone surety on Horton's contract to construct those houses, and they are suing them here because of Horton's failure to construct the houses, endeavoring to enforce against those two sureties their liability on Horton's bond for the construction of the two houses.

The defences which the defendants have urged here are two in number. They claim, in the first place, that Horton and McKimmie, after having made the original contract between Horton and the McKimmies, changed that contract by extending the time which the original contract placed as the limit for its performance. They claim in addition to the fact that Horton and the McKimmies had agreed to extend the time for the completion of the building of the houses, that the two sureties did not know anything about that extension and did not agree to it.

Now the merit that lies in that contention is this, and I will illustrate it. When two parties, like the McKimmies and Horton, enter into a contract, and agree that certain things will be done and a third person becomes surety that that contract will be performed, then his contract is that the person for whom he becomes surety will carry out that very agreement that he has already made.

Now if the two original parties to the contract come together and make another agreement which takes the place of their first agreement, that wipes out the first agreement, and therefore there is nothing for the surety to be held on that he agreed to be held on, because the new agreement takes the place of the first agreement that is wiped out by changing it; and unless the surety consents
43 to the new agreement then he has not become surety for the new agreement and cannot be held liable.

So that the point of their defence in that aspect amounts to this: that they say they did not consent to the new agreement Horton and the McKimmies made on the point of extending the time of the original contract. Now if it is true that after the original contract was made Horton and the McKimmies came together and changed that original contract by extending the time in which it should be completed, then that would have released these sureties unless they consented to and assented to that extension of time. That is what makes the importance of these two writings that are in evidence; because the plaintiffs claim that those two writings, each of which is an extension of time, were actually signed by the defendants. But the defendants are urging the contention that they did not sign either of those two extensions; that they are forgeries, and that therefore there is no proof in the case that shows that they consented to the extension of the time for the completion of the original contract.

Now one of these papers that have been called extension papers, for convenience—one of those papers is dated the 27th day of July, 1906, and the other paper is dated the 27th day of November, 1906. You will have to look into the evidence in the case and determine from all the considerations that influence your minds upon that point, whether or not these defendants did actually sign those papers that purport to bear their signatures; because if they signed the paper dated July 27th, 1906, that paper shows in it a
44 provision that the original contract shall be extended; so that if they signed that, it shows that they assented to the first extension; and if they signed the second paper, the one dated November 27th, 1906, of course that shows that they agreed to the second extension because that paper if signed, itself is the second extension.

Therefore, if you find in favor of the plaintiffs on those points, that is to say that the defendants did actually sign those papers, the one dated July 27th 1906, then that would show that they consented to the first extension and wipes out that much of their defence. If you find that they signed the second paper, the one dated November 27th, 1906, that would prove that they did assent to and agree to the second extension, and therefore, there would be nothing left of this phase of their defence, which would avail them and the plaintiffs would be entitled to recover against them. The defendants, through their counsel, have urged another defence which in the judgment of the Court is of no consequence. I want to refer to it briefly, however, in order that you may understand certain special questions that the court will submit to you to answer. The other phase of the de-

fence which was urged on behalf of the defendants was this: They claim that because the McKimmies had not conveyed to Horton the two lots that the houses were to be built on, that that was a change in the original contract which released the sureties. The Court, however, is of the opinion as a matter of law, that that would not amount to a change of this original contract because this contract provides for the re-conveyance back to the McKimmies by Horton
45 of these very lots that the McKimmies agreed to convey to Horton; therefore, the Court is of the opinion, as a matter of law, that that cannot help these defendants toward releasing them.

Therefore, you can decide the case by your general verdict without having that general verdict influenced at all by the consideration that the McKimmies did not convey the lots to Horton. Your general verdict—that is to say your general finding whether the case ought to be decided in favor of the plaintiffs or the defendants will depend upon the considerations already submitted respecting those two extension papers. If the defendants signed the last of the two extension papers, that is to say, the one dated November 27th, 1906, then they are responsible to the plaintiffs, and your verdict ought to be a general verdict in favor of the plaintiffs. But in view of the subsequent proceedings that will be had in the case, the Court desires the benefit of the finding of the jury on certain questions of fact which are embraced in these special questions that the Court will submit to you to decide from the evidence. The evidence is already before the court and you are the tribunal whose function it is to decide the questions of fact. So that after you decide these special questions of fact, the Court, in the subsequent proceedings in the case, will have those facts settled; but if you do not decide these in this trial, then the Court could not tell what the facts were in that regard and it would be an embarrassment.

The first of these special questions is this; and they are plain enough for you to understand them without detailed ex-
46 planation: "Did the defendants sign the extension paper dated July 27th, 1906?" You are to decide that question from the evidence. If you find that they did sign the paper dated July 27th, have your foreman write "Yes" in that space which is opposite the place marked "Answer." If you find that they did not sign that then let him write "No" there.

The second question is: "If they did sign that paper dated July 27th 1906, then at the very time they signed it, on July 27th, did they know that those two lots had not been conveyed to Horton?" If you find that they then knew that the two lots had not been so conveyed, then your foreman should write the answer "Yes" in the space opposite that. If you find that they did not know that the lots had not been conveyed on July 27th 1906, let him write the answer "No."

The third question is: "Did they sign the extension paper dated November 27 1906?" If you find that they did, let the answer "Yes" be written below that question.

The fourth question is: "If they did sign the paper of November 27th did they at that time know that the two lots had not been conveyed to Horton?" Let your foreman write the appropriate answer

to that question, and then let him sign his name—just his name, not the names of all the jurymen, and let his name be signed at the bottom.

Now if you find, gentlemen, in favor of the plaintiffs—that is to say if you find that the defendants did sign those extension papers, and particularly the one of November 27th, then, in addition to answering these special findings you will render also a general
47 verdict in favor of the plaintiffs; that will involve the necessity of deciding how much in damages the plaintiff ought to recover. This bond on the face of it says that the recovery shall be $7,000. That is a mere arbitrary sum. The law does not permit the recovery of mere arbitrary sums that the parties fix in advance, because it is against public policy that one mon should be required to pay to another man through the judicial tribunals any sum greater than his actual damages; so the law only permits a recovery in this case to the extent of the actual damages that the plaintiffs can prove themselves to have sustained, independent of what figure the parties have arbitrarily written on the face of the bond. Therefore, you will have to lay aside that arbitrary figure of $7,000, that the bond states, and determine from the evidence what the actual damages are that the plaintiffs show from the evidence they have sustained through the failure of Horton to comply with his contract. That contract was to build two houses one on each of the two lots. He has not done it. Therefore if the verdict of this jury should be that the plaintiffs are entitled to recover, the amount of the verdict should be a sum which would put them in as good a situation financially as they would have been if Horton had put the two houses on the lots. If he had put the two houses on the lots, complete on May 2nd, 1907, the plaintiffs would have had the houses on the lots and would have been entitled to rental for the houses, or the use of them from May 2nd, 1907 up to the present time, but they have not had that. They have not had either the houses on the lots nor the use thereof. Therefore, the measure
48 ure of their damages, if you find they are entitled to recover, would be first the difference between the value of the lots as they were without the houses and the value of the lots as they would have been on May 2nd, 1907 if those houses had been built there—the houses that are described in these plans and specifications. You would have to decide from the evidence the value of the lots without the houses on them upon that day, and then ascertain from the evidence the value of the lots with the houses on them at that date; and the difference between those two values would be the measure of damages in that one respect. Now inasmuch as, if the houses had been built on May 2nd, 1907, the plaintiffs would have had the right to use them, and therefore to enjoy the rental value of them from that time up to the present, if they are entitled to recover, they should have in addition to the difference between the value of the lots with the houses on them and without, the fair market value of the use of those houses from May 2nd, 1907 up to date—the date of your verdict.

Now the value of the use of a house is its rental value. Therefore,

in that phase of the question you will have to determine from the evidence the reasonable rental value of the houses from May 2nd, 1907 up to date.

You may take your exceptions, gentlemen.

Mr. POE: I think, if your Honor please, it ought to be the net rental value.

Mr. RIDOUT: How could that be? They have to pay taxes anyhow. That has got nothing to do with it. They have lost the taxes.

Mr. POE: I think with that exception, we desire to re-
49 serve an exception to the failure of the Court to use the words "net rental value from that date to the present time."

The COURT: I think the charge as given should stand. Now summarizing, gentlemen,—because these special interrogatories are not submitted to juries in every case,—you understand that you will render your general verdict in favor of the plaintiffs or the defendants, whichever way you find; if you find in favor of the plaintiffs, then the measure of the plaintiffs' damages is composed of two items; that is to say, the difference between the value of the lots with and without the houses, and, added to that, the rental value of the houses from May 2nd, 1907, up to the date of your verdict. That would be your general verdict. Then in addition to that, answer these special questions and have your foreman sign his name to the answers.

Mr. POE: I desire, if your Honor please, to request that the jury may be permitted to take these papers with them, the bond, the agreement and these two papers of extension, if there is no objection.

Mr. AMBROSE: There is absolutely none.

The COURT: The jury may take them.

The jury thereupon retired to consider of its verdict, and after such consideration returned to the court room and rendered a verdict in favor of the plaintiffs for $5736.72, and also answered the four questions propounded to them by the Court in the affirmative.

After the noting of the said exceptions hereinbefore set forth, and the making of the same a part of the record, which is also
50 made a part hereof, and because the matters and things hereinbefore recited which are not matters of record may be made to appear as matters of record, and in order that the defendants may have their case reviewed on appeal by the proper court, the defendants by their attorney move the court to sign this their Bill of Exceptions, to have the same force and effect as if each and every one of said exceptions had been separately signed, which motion is by the Court granted; and thereupon the defendants tender this their Bill of Exceptions, and request the Court to sign the same according to the statute in such cases made and provided and it is accordingly done, now for then, this 6th day of June A. D. 1910.

DAN THEW WRIGHT, *Justice.*

Settled by agreement
CHAS. POE,
Att'y for Wilkinson & Kemp.
W. E. AMBROSE,
JOHN RIDOUT,
For Plaintiffs.

* * * * * * *

To Messrs. William E. Ambrose and John Ridout, Attorneys for Plaintiffs.

GENTLEMEN: I beg leave herewith to present a copy of the proposed Bill of Exceptions in the above entitled cause and to give notice that the same will be submitted to the Court to be settled on Friday the 27th day of May, 1910 at 10 o'clock A. M. or as soon
51 thereafter as counsel can be heard.

CHAS. POE,
Attorney for Defendants Wilkinson and Kemp.

Service of the above notice and copy of the bill of Exceptions accepted this 17th day of May, 1910.

JNO. RIDOUT,
W. E. AMBROSE,
Attorneys for Plaintiffs.

(Endorsed:) Sub. May 27/10. W.

52 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 51, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51527 at Law, wherein Oscar A. M. McKimmie, et al. are Plaintiffs and Oscar Wilkinson, et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22d day of July, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2197. Oscar Wilkinson et al., appellants, vs. Oscar A. McKimmie. Court of Appeals, District of Columbia. Filed Jul- 26, 1910. Henry W. Hodges, clerk.

WEDNESDAY, *December 7th*, A. D. 1910.

No. 2197.

OSCAR WILKINSON and THOMAS J. KEMP, Appellants,
vs.
OSCAR A. M. McKIMMIE and SIMON McKIMMIE.

The argument in the above entitled cause was commenced by Mr. Charles Poe, attorney for the appellants.

THURSDAY, *December 8th*, A. D. 1910.

No. 2197.

OSCAR WILKINSON and THOMAS J. KEMP, Appellants,
vs.
OSCAR A. M. McKIMMIE and SIMON McKIMMIE.

The argument in the above entitled cause was continued by Mr. Charles Poe, attorney for the appellants, and by Mr. John Ridout, attorney for the appellees, and was concluded by Mr. Charles Poe, attorney for the appellants.

No. 2197.

OSCAR WILKINSON and THOMAS J. KEMP, Appellants,
vs.
OSCAR A. M. McKIMMIE and SIMON McKIMMIE.

Opinion.

Mr. Chief Justice SHEPARD delivered the opinion of the Court:

On November 27, 1906, Oscar A. and Simon McKimmie entered into a contract with George P. Horton whereby they covenanted to sell to Horton lots 27, 28, 29, and 30 in Todd and Brown's subdivision of Mount Pleasant and Pleasant Plains in the District of Columbia for the sum of $11,500. In consideration of said promise and the sum of $10, Horton agreed to purchase said land, promising to assume the payment of a mortgage of $3,000 on said property; to pay $1,000 on delivery of the deed; and to reconvey to the McKimmies two lots each sixteen feet and eight inches on Brightwood avenue (part of the above described lands), free of all incumbrances, liens, etc., first erecting on each a two-story brick dwelling complete according to plans and specifications approved by said parties; said houses to be completed within eight months from date. Said Horton also agreeing to give a satisfactory bond for the construction of said houses as stipulated. The contract was under seal. Under date of January 6, 1906, Horton as principal with Wilkinson

and Kemp as sureties, executed under seal, and delivered a bond to Oscar A. and Simon McKimmie binding themselves jointly and severally, in the sum of $7,000 for the faithful performance of the contract aforesaid.

On April 2, 1909, Oscar A. and Simon McKimmie brought an action against Horton, Wilkinson, and Kemp. The declaration set out the contract and bond aforesaid, and alleged the conveyance to Horton of the land aforesaid, except that "in lieu of conveying to him the two lots, each sixteen feet eight inches front on Brightwood avenue, the said plaintiffs, at the request of said Horton for the purpose of saving the expenses and inconvenience of a reconveyance, retained the title to the two lots mutually agreed upon and selected by them and the said Horton." It was further alleged that at the request of the said Horton and with the consent of said sureties the time for the performance of said agreement was extended for a period up to January 2, 1907, and thereafter upon request and upon consent as aforesaid, the time was further extended to May 2, 1907. It was further alleged that Horton had failed to perform said agreement by erecting said houses, whereby said lots were worth $7,000 less than they would have been had said houses been erected as agreed. Wilkinson and Kemp demurred to the declaration on the ground that it showed such a variation of the terms of the contract and bond as to release the sureties.

The demurrer was sustained by the justice then holding the circuit court, with leave to plaintiffs to amend. The amended declaration followed the original, but elaborated the allegation with regard to the extension of time, alleging that each extension was consented to by the sureties in writing. It was further alleged that prior to the consent to said extension of time the said sureties had actual notice of the fact that the two lots, each fronting sixteen feet eight inches on Brightwood avenue had not been conveyed by plaintiffs to said Horton.

Defendants pleaded: (1) That they were not indebted as alleged; (2) that defendant Horton had fully performed his agreement; (3) that plaintiffs were not injured by the failure of said Horton; (4) that defendants never had notice that the two lots fronting on Brightwood avenue had not been conveyed to Horton, and never consented to any extensions of time for performance by Horton as alleged; (5) that defendants never assented to the alteration or modification of the terms or conditions of the contract. Plaintiffs discontinued as to Horton, and joined issue on the said pleas.

Plaintiffs offered in evidence the contract and bond, the execution of which was admitted. Defendants objected to their competency under the amended declaration which was in form neither in debt, covenant, or assumpsit, as claimed by plaintiffs; and further, because it appeared on the face of the declaration that there had been a material variation of the terms of the bond and contract, and it did not appear whether the variation of said terms was under seal or by parol. The court overruled the objections, holding that the amended declaration was sufficient, and that the variation of the

terms of the contract by the failure to convey to Horton the part of the land included in the two Brightwood avenue lots was not a material variation of the terms of said contract and bond. Defendants excepted. Plaintiffs then offered in evidence two writings, of date respectively July 27, 1906, and November 27, 1906. Each contract, purporting to be signed by Horton and each surety, provided, upon a consideration, for extensions of the time of performance by Horton, the first to January 2, 1907, and the second to May 2, 1907. To the first extension agreement one of the signatures was "Thomas J. Kemp;" to the second "T. J. Kemp." Each extension agreement was attested as follows: "Signed, sealed, and delivered in the presence of." Signed: "Geo. E. Terry, Notary Public, D. C.," with seal attached.

Kemp, called as a witness by the plaintiffs, and asked if he signed his name to said papers, said that: "While the signatures looked like his, he had no recollection of ever signing either of said papers, and that he had never signed any paper before George E. Terry, notary public, and that he never signed his name 'Thomas J. Kemp,' but invariably signed it 'T. J. Kemp.'"

Wilkinson, called as a witness by plaintiffs, testified that "he had no recollection of signing either of said papers; that one of said papers looked like his genuine signature, to wit, the paper having date 27th of July, 1906, while that bearing date November 27, 1906, did not look at all like his signature." He said further that he never signed any paper with George E. Terry, notary public, as a witness. The papers were admitted in evidence over the objections of defendants, who excepted. W. E. Ambrose, attorney for plaintiffs, testified that on March 7, 1907, at a conference at his office, there were present, besides himself, Herman W. Van Senden, the two defendants, the plaintiffs, and Charles Poe. Said conference was called by him because of Horton's insolvency. It was stated by some one that it was a lucky thing that the plaintiffs had not conveyed the two lots in question to Horton. There was some discussion of that subject, the details of which he did not remember.

Oscar A. McKimmie, testified that he saw Wilkinson every day or so after the execution of the contract and talked about the progress of Horton. Was at the conference in Ambrose's office. Conversation was as to what Horton had done before conveying to Van Senden. Statements were made by several persons about the two lots not having been conveyed, and it was understood that they had not been conveyed. All the property was conveyed to Horton except the two lots, which was at his suggestion. Witness identified the plans and specifications for the erection of seventeen houses by Horton, and conversed about leaving out the two lots. That subject was discussed in detail, the two lots joining. Never had any conversation with Kemp about leaving out the two lots until the full conversation in Ambrose's office. He also testified to the value of the two lots with and without the houses. On cross-examination he was asked: "Did you subdivide the lots mentioned in the agreement without consulting Kemp or Wilkinson?" The court sustained plaintiff's objection to answering this question.

Haller, the architect, testified that he drew the plans and specifications of the houses for Horton, which were never built. Wilkinson was in his office frequently and knew that the plaintiffs were holding the two lots and made no objection to the same. Kemp was anxious about the building of the two houses for the McKimmies. Wilkinson said that Kemp would look out for the McKimmies and see that they got what they were paying for. McKimmies had given fifteen lots for these two houses. Kemp urged him to build these houses. Had no conversation with Kemp about the two lots.

Simon McKimmie testified that he was present at the conference in Ambrose's office, and there was some conversation about the two lots which he could not recall. Everybody seemed to think it fortunate that these two lots had not been conveyed to Horton. Did not get the extension papers from Kemp, Wilkinson, or Terry, but from Horton. Was not present at their execution.

Kemp, for defendants, testified that he first met the McKimmies in Ambrose's office in January, 1907. Never talked with them about these lots. First learned that they had not been conveyed from Mr. Poe when witness took him a copy of the declaration in this case. George P. Hoover had been his attorney before that. There was no conversation about the two lots at the conference. Defendants were called there because Horton had failed in his building contracts and had made a deed of the land, conveyed by plaintiffs, to Van Senden. There was some talk of throwing Horton into bankruptcy. Witness said that he received the following letter on March 9, 1907:

"MARCH 7TH, 1907.

"Drs. Oscar Wilkinson and Thomas J. Kemp, Washington, D. C.

"DEAR SIRS: I beg to notify you as counsel for Messrs. Oscar A. M. McKimmie and Simon McKimmie, and duly authorized by them, George P. Horton, Jr., one of the parties to a contract bearing date November 27th, 1905, for the performance of which contract, you and each of you, became sureties under a bond for the performance of said contract executed the 10th day of January, A. D. 1906, has not performed, or attempted to perform, his said contract, or any part thereof, or any of the covenants or agreements by him made or contained therein, and that the time for the performance of said contract, together with the extensions therein granted to him, and acceded to by you, has about elapsed. We, therefore, demand that the covenants of said contract be performed by you in event of failure upon the part of the principal.

"This letter is in pursuance of previous conversations had relative to this matter at various times.

"Very respectfully,

"WM. E. AMBROSE."

Made no reply to this letter. Did not sign the extension dated July 27, 1906; did sign that of November 26, 1906.

Oscar Wilkinson, for defendants, testified: Never had any conversation with plaintiffs after signing the bond. Was in Haller's office

frequently in 1905, but never discussed the matter of the transfer of these lots with him, and never saw the plans and specifications. Did not know the lots were not transferred. The signature on extension paper of July 27, 1906, looks like my signature, but have no recollection of signing it. As to the one of November 26 I have no recollection and would not acknowledge as my signature. Having explained the signatures he said: "Those signatures speak for themselves." Cross-examined he said the conference in Ambrose's office was primarily about putting Horton in bankruptcy. Did not remember conversation about the two lots. Asked: "Did you or not sign these papers?" (the extensions). He said: "I do not remember signing either one."

Van Senden testified that he was at the conference in Ambrose's office. Came at the request of Ambrose. The conveyance of the fifteen lots by Horton to him provoked the meeting. Had been conveyed to him as security. Afterwards bought them at a sale under a first deed of trust. The subject of conference was Horton's delinquency on the Kenyon street contract. Did not recollect that anything was said about the two lots.

Charles Poe testified that he attended the conference as Van Sendén's attorney and wholly in his interest. Could recall no suggestion that the two lots had been omitted from the conveyance to Horton.

The defendants prayed the court to instruct the jury as follows: 1. Plaintiffs can not recover on the bond and agreement mentioned in the declaration and offered in evidence, and the verdict must be for the defendants. 2. The verdict must be for the defendants because there is no evidence to show that the plaintiffs ever had a good title to the property described in the contract. 3. Verdict must be for defendants because there is no evidence that defendants, or either of them, ever authorized the plaintiffs to subdivide the property. 4. Verdict must be for the defendants because there is no evidence legally sufficient to show that defendants, or either of them, authorized or consented to the conveyance to Horton of less than the whole of the property.

These were refused, with exceptions reserved.

In the general charge the court explained the issues to the jury in language that was not excepted to, and charged them, if they found that defendants executed the two extension papers, the plaintiff would be entitled to recover on that issue. In regard to the failure to convey the two lots to Horton, the court charged the jury that as a matter of law, it was not such a change in the contract as would release the sureties. He, however, submitted four special issues: 1. Did the defendants sign the extension agreement of July 27, 1906? 2. Did they then know that the two lots had been conveyed to Horton? 3. Did they sign the paper of November 26, 1906? 4. Did they then know that the two lots had not been conveyed to Horton? He then charged the jury as to the measure of damages in case of finding for plaintiffs. In stating the ground of recovery on account of the rental value of the houses, defendants' counsel excepted, because of the word "net" before rental value.

No other exception was noted. At request of defendants and with consent of plaintiffs, the jury were permitted to take with them the contract, bond, and the two extension papers. The jury answered "yes" to each of the special issues submitted and returned a general verdict for plaintiffs for $5,736.72.

Defendants moved in arrest of judgment: 1. Because the action is against but two of the three joint and several obligors on the bond. 2. Because the action has been discontinued against one of the three joint and several obligors. 3. Because though one of the three joint and several obligors has died since the institution of this suit, plaintiffs have failed to make his personal representative a party defendant. 4. Because the declaration shows upon its face that the bond sued on was altered and amended by parol agreement of the parties subsequent to its execution under seal. The motion was overruled and judgment entered on the verdict for $5,736.72.

From this defendants have appealed.

There are nineteen assignments of error in this case, some of which have been argued together. Under the first group the contention is, that while the declaration counts upon the contract and bond under seal to a certain point, and that far sounds in debt, it does not stop there, but proceeds to allege the alteration of the contract in respect of the change in excepting the two lots from the conveyance to Horton, and in respect of the extensions of time for completion, without alleging that the said alterations were under seal.

For this reason it is contended that the declaration sounds in assumpsit, and the instruments under seal are not admissible thereunder. We perceive no merit in this contention. The declaration complies with rule 27 of the Supreme Court of the District, in that it contains a plain statement of the facts necessary to constitute the cause of action, and is substantially in the form of covenant. It sets out the contract and bond under seal and the breach of the obligation. In anticipation of the defense founded on the extension of the time for performance it alleges the consent of defendants thereto. The action is on the bond given for the performance of the contract that was not performed. The liability of the sureties would be discharged by the extension unless it could be shown that they had consented thereto. It was proper and necessary to allege this consent in order to recover on the bond. No additional claim was founded on those instruments. In this respect the declaration was similar to those in two of the cases relied on by defendants—the first in support of this contention and the second on the question of discharge by reason of the alteration of the contract in the matter of the omission to convey the two lots. Phillips, etc., Construction Co. v. Seymour, 91 U. S., 646-652; U. S. v. Freel, 186 U. S., 309-310. Phillips v. Seymour was an action of covenant for part performance of a contract under seal, the complete performance of which in time had been prevented by the defendant. An additional recovery was had on a special finding by the jury upon evidence of extra work done under an additional parol agreement.

The court said: "There is no allegation of this promise in the declaration which is an action of covenant on the sealed agreement.

There is no allusion to it, or provision for it, in that instrument. It is found by the special verdict to be a promise, and the record shows it was by parol." It was held that assumpsit would be the proper action on this promise and that it could not have been joined, if attempted, with the action of covenant, under the common law rules of pleading prevailing in the State where the action had been brought. Judgment on the special verdict was reversed, but that founded on the sealed contract with proof of waiver of performance in time was affirmed.

Nor do we coincide with the view that the sureties were discharged by the change in the performance of the contract by which the two lots were excepted from the conveyance to Horton. A material change in a contract with a principal without the assent of the surety, even though it may prove to his advantage, discharges the latter. But an immaterial change that does not put the surety in a position different from that he before occupied, has no such effect. Roach v. Summers, 20 Wall., 165-169; Cross v. Allen, 141 U. S., 528-537; The Beaconsfield, 158 U. S., 303-312.

The exclusion of the two lots from the conveyance to Horton, at his suggestion, was a mere matter of convenience that worked no change in the positions, rights or obligations of the parties.

In form the contract was to convey the whole of the land to Horton, who was to reconvey the two lots and erect certain houses upon them, the same to be free of any and all liens and incumbrances. Its real effect was that Horton was to have title to the remainder of the land in consideration of his erecting the two houses on the lots for plaintiff. Notwithstanding the form of the contract, upon conveyance of the whole the equitable title to this part would remain in the plaintiffs.

The defendants' second prayer was properly refused, because it was not necessary that plaintiffs should prove that they had a good title to the land described, the same not having been put in issue or even questioned. Nor was it necessary to prove authority for the subdivision of the property into the small lots upon which Horton intended to erect a series of houses. The two small lots to be reconveyed to plaintiffs were expressly provided for. It was not error to submit to the jury the consideration of the evidence regarding the execution of the two extension agreements. Kemp admitted that he signed the latter paper and would not say positively that he did not sign the other. Nor did Wilkinson deny the execution of either; he did not recollect the fact. One signature looked like his; the other he would not acknowledge as his. He compared them with signatures to the other papers, and said "those signatures speak for themselves." That he relied upon an apparent difference between these several signatures is shown by the request of his counsel that the jury should take all of the signed papers with them for consideration. Moreover, the letter of Ambrose notifying them of the default of Horton and of the near approach of the expiration of the extension acceded to by them, was not responded to or denied. While the testimony was meager, we think it was sufficient to be submitted to the jury, who specially found that they executed each

paper, and also that they had knowledge of the omission to convey the two lots to Horton, when each was executed.

That the action was discontinued as to Horton, who it seems had become insolvent, presents no ground for arresting the judgment. Section 1211 of the Code simply provides that one action may be sustained and judgment recovered against all or any joint and several obligors. It does not require that this shall be done. We have considered all of the points involved, without separately noting the several unnecessary assignments of error, and find no ground for reversal. The judgment will therefore be affirmed with costs.

Affirmed.

No. 2197, January Term, 1911.

OSCAR WILKINSON and THOMAS J. KEMP, Appellants,
vs.
OSCAR A. M. MCKIMMIE and SIMON MCKIMMIE.

Appeal from the Supreme Court of the District of Columbia.

MONDAY, *February 6th, A. D.* 1911.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

PER MR. CHIEF JUSTICE SHEPARD,
February 6, 1911.

No. 2197.

OSCAR WILKINSON and THOMAS J. KEMP, Appellants,
vs.
OSCAR A. M. MCKIMMIE and SIMON MCKIMMIE.

THURSDAY, *February 9th, A. D.* 1911.

On motion of Mr. Charles Poe, attorney for the appellants, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of ten thousand dollars, and the bond for costs is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Becaue in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Oscar Wilkinson and Thomas J. Kemp, Appellants, and Oscar A. M. McKimmie and Simon McKim-

mie, Appellees, a manifest error hath happened, to the great damage of the said Appellants, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 9th day of February, in the year of our Lord one thousand nine hundred and eleven.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by

——— ———.

(Bond on Writ of Error.)

Know all Men by these Presents, That we, Oscar Wilkinson and Thos. J. Kemp, as principals, and A. J. Shippert, as surety, are held and firmly bound unto Oscar A. M. McKimmie and Simon McKimmie in the full and just sum of three hundred dollars to be paid to the said Oscar A. M. McKimmie and Simon McKimmie, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 25th day of March, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between said Oscar Wilkinson and Thos. J. Kemp as appellants and said Oscar A. M. McKimmie & Simon McKimmie as appellees a judgment was rendered against the said Wilkinson & Kemp and the said Wilkinson and Kemp having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Oscar A. M. McKimmie and Simon McKimmie, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Oscar Wilkinson & Thos. J. Kemp shall prosecute said writ of error to effect, and answer all costs if they fail to make — plea

good, then the above obligation to be void; else to remain in full force and virtue.

A. J. SHIPPERT. [SEAL.]
OSCAR WILKINSON. [SEAL.]
THOS. J. KEMP. [SEAL.]
A. J. SHIPPERT. [SEAL.]

Sealed and delivered in the presence of—

CHAS. POE.

Approved by:

SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

UNITED STATES OF AMERICA, *ss:*

To Oscar A. M. McKimmie and Simon McKimmie, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Oscar Wilkinson and Thomas J. Kemp are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 29th day of March, in the year of our Lord one thousand nine hundred and eleven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted Mar. 29th, 1911.

W. E. AMBROSE,
JOHN RIDOUT,
Counsel for Plaintiffs in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Mar. 29, 1911. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 37 inclusive contain a true copy of the transcript of record and proceedings of said Court of

Appeals in the case of Oscar Wilkinson and Thomas J. Kemp, appellants, vs. Oscar A. M. McKimmie and Simon McKimmie, No. 2197, January Term, 1911, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 29th day of March A. D. 1911.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,640. District of Columbia Court of Appeals. Term No. 273. Oscar Wilkinson and Thomas J. Kemp, plaintiffs in error, vs. Oscar A. M. McKimmie and Simon McKimmie. Filed April 26th, 1911. File No. 22,640.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 273.

OSCAR WILKINSON AND THOMAS J. KEMP,
Plaintiffs in Error,
vs.
OSCAR A. M. MCKIMMIE AND SIMON MCKIMMIE,
Defendants in Error.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

This case comes here on writ of error to the Court of Appeals of the District of Columbia sued out by Oscar Wilkinson and Thomas J. Kemp to review and reverse a judgment of that Court, which affirmed a judgment of the Supreme Court of the District of Columbia, entered against them on the verdict of a jury. (Rec., p. 35.)

STATEMENT.

On the 27th day of November, A. D. 1905, the defendants in error, who were plaintiffs in the court below, entered into an agreement with George P. Horton, Jr., who was a builder, to sell him lots 27, 28, 29 and 30, in block 9, in Todd and Brown subdivision of Mount Pleasant and Pleasant Plains, for the sum of $11,500.00. Horton was to pay the defendants in error as the consideration for the conveyance to him of said lots in the following way: He was to assume and pay an indebtedness of $3,000.00, to pay $1,000.00 in cash upon the delivery of the deed, and was to reconvey to the defendants in error two lots, each 16 feet, 8 inches front, on Brightwood Avenue (part of the land above described) free and clear of all incumbrances and to erect on each a two-story brick dwelling, constructed and completed from plans and specifications approved by the defendants in error, within eight months from the date of said agreement, and was to give his two notes for $250.00 each, secured by a second deed of trust for the remaining $500.00 of the purchase money. This agreement is set out in full on pages 11 and 12 of the Record.

On the 27th day of December, 1905, the defendants in error and their wives executed and delivered to Horton a deed, which purports to convey to him "lots number 39 to 52, both inclusive, and lots 55 and 56 in Oscar A. M. McKimmie and others' subdivision of lots in block number 9 of Todd and Brown subdivision of part of Mount Pleasant and Pleasant Plains, as per plat of said subdivision recorded in book county No. 20, page 105, in the office of the surveyor of the District of Columbia." This deed is to be found on page 20 of the Record.

On the 10th day of January, 1906, Horton, as principal, and the plaintiffs in error, as sureties, entered into a bond

to the defendants in error conditioned for the faithful performance by Horton of the terms and conditions of the agreement between him and the defendants in error. (Record, pp. 10 and 11.)

Horton did not carry out his contract and this suit was instituted against him and the plaintiffs in error by the filing of a declaration in the lower court on April 2, 1909 (Rec., pp. 1 and 2). This declaration sets forth the bond and recites the agreement and then states as follows:

> "And plaintiffs say that they conveyed to said Horton the said real estate described in said agreement except that in lieu of conveying to him the two lots, each 16 feet 8 inches front on Brightwood avenue, the said plaintiffs at the request of said Horton for the purpose of saving the expense and inconvenience of reconveyance retained the title to the two such lots mutually agreed upon and selected by them and the said Horton."

> "And the plaintiffs further say that at the request of the said Horton and with the consent of said sureties the time for performance of said agreement was extended for a period, up to January 2, 1907, and thereafter at the request of said Horton and with the consent of said sureties the time for fulfillment of said contract was further extended for a period up to May 2, 1907." (Rec., p. 2, par. 3.)

To this declaration the plaintiffs in error filed a demurrer, accompanied by the following memorandum (Rec., p. 3):

> "One of the questions of law intended to be presented by the above demurrer is whether there has not been such a variation of the terms of the contract and bond sued upon as to release and discharge the defendants, Oscar Wilkinson and Thomas J. Kemp, from any liability thereupon." (Rec., p. 3.)

This demurrer was sustained by Mr. Chief Justice Clabaugh, with leave to the plaintiffs to file an amended declaration herein as advised (Rec., p. 4), and on May 5, 1909, the plaintiffs filed an amended declaration in which, after reciting the bond, agreement, their failure to convey the two lots to Horton and the two alleged extensions of time, in which he was to fulfil his contract, they make this additional allegation:

> "And the plaintiffs further say that prior to the making of said extensions the said sureties had actual notice of the fact that the said two lots each fronting 16 feet 8 inches on Brightwood avenue, had not been conveyed by plaintiffs to said Horton, and with such actual knowledge not only assented to the extensions aforesaid but expressly affirmed their liability under the said writing obligatory dated January 10, 1906."

They then set forth in their amended declaration as their damages the difference betwen the value of these two lots, with houses upon them, and without houses upon them, and they claim seven thousand dollars ($7,000.00), which is the amount of the penalty named in the bond (Rec., pp. 4 and 5). To this amended declaration the plaintiffs in error pleaded five pleas (Rec., p. 6), and the issues were then made up. Your Honors will thus observe that in entering the judgment *sustaining the demurrer*, his Honor Chief Justice Clabaugh established it as the law of this case that the failure to convey the two lots to Horton was a material variation of the terms of the contract and discharged the sureties from liability thereon.

U. S. vs. Freel, 186 U. S., 309, same case, 46 Fed. Rep., 1177.

Whether the Chief Justice ruled correctly or not upon this point is immaterial. His was a ruling *sustaining*—not overruling—a demurrer and was acquiesced in, and not appealed from, and an amended declaration filed in consequence of it. It is the law of this case for all time. Upon this point this court, in Ferguson, Executor of Clearwater, vs. Meredith, 1 Wallace, 25, says:

> "Where a party pleads *de novo* after a demurrer was sustained to his original pleading, he waives any right he may have to question the correctness of the decision of the court on the demurrer."

> "Whether the former decision was right or wrong or was induced by the want of the particular evidence that was offered in the present case was not the question. However that might be, it was final and put an end to the litigation."
>
> New Orleans vs. Bank, 167 U. S., 371.
>
> Werlein vs. New Orleans, 177 U. S., 390.

Section 1533 of the Code D. C., provides that where a *demurrer* is *overruled* the party may plead over without waiving his rights, but that section does not apply to a case where the demurrer is *sustained* and the unsuccessful party acquiesces in the correctness of the ruling, takes no appeal therefrom and reserves no exception thereto.

The action of the trial judge with reference to this point at the trial of the cause on its merits has induced us to set out thus fully in this statement of facts the law applicable to this point of pleading as we understand it to be.

At the trial the plaintiffs offered in evidence the bond and agreement sued upon and the defendants, while admitting their execution and delivery, objected to their admissibility or competency as proof under the declaration, they being sealed instruments and the declaration being, as was

contended, neither in debt or covenant, but the learned judge (Mr. Justice Wright) overruled this objection on the distinct ground that the rules of court had abolished the distinction between the forms of actions in the District of Columbia. The court also held that the failure by plaintiffs in error to convey the two lots of ground, whether with or without the consent of the sureties on the bond, was not such a material variation of its terms as to discharge the plaintiffs in error from their liability thereupon as sureties.

Notwithstanding this ruling that the modification of the contract was not an essential one, the court, at the same time, submitted to the jury four special interrogatories to be answered by them (Rec., p. 7), telling them, however, at the same time, that they could decide the case by their general verdict without having that general verdict influenced at all by the consideration that the McKimmies did not convey the lots to Horton (Rec., p. 24, par. 2).

After the suit was instituted the defendant Horton was duly summoned, but it does not appear from the Record that he ever appeared and filed pleas, nor does it appear that any judgment by default was ever entered against him. The only thing that does appear with reference to him is that, shortly before this case was put on trial, and after Horton's death, it was discontinued as to him (Rec., p. 6), and it is stipulated in the bill of exceptions (Rec., p. 21), that no proceedings had been taken in this cause to make the personal representatives of said deceased, George P. Horton, Jr., a party defendant to the cause.

The jury returned a verdict for the plantiffs for $5,736.72; the defendants filed motions for new trial and in arrest of judgment (Rec., pp. 7 and 8), these were overruled, and judgment entered upon the verdict, and from this judgment an appeal was prosecuted to the Court of Appeals, where the judgment was affirmed.

Assignment of Errors.

The trial court below erred in:

First. Admitting in evidence and permitting to be read to the jury the bond and agreement referred to, because the same was incompetent under the declaration and pleadings in the cause.

Second. In admitting in evidence the two papers called "Extensions" because there was no evidence legally sufficient to prove that they were ever executed or delivered by the appellants.

Third. In admitting said "Extensions" in evidence because the attesting witness thereto was not called to prove the execution and delivery thereof, and the failure to call him was not explained.

Fourth. In ruling that the failure to convey to Horton the two lots mentioned in the declaration was not a material variation of the terms of the bond and agreement sued on.

Fifth. In not following the ruling of Chief Justice Clabaugh that such failure to convey said two lots was a material variation and released and discharged the appellants from liability as sureties.

Sixth. In ruling that the distinction between the forms of action no longer prevails in this jurisdiction.

Seventh. In submitting the four special interrogatories to the jury—though holding that the answer thereto was not pertinent to any issue involved in the cause.

Eighth. In refusing to rule that there was no evidence that the appellants ever assented to the alleged

agreement between the appellees and Horton that the appellees should retain title to the two lots referred to in the declaration.

Ninth. In refusing to grant the first prayer of the appellants.

Tenth. In refusing to grant the second prayer.

Eleventh. In refusing to grant the third prayer.

Twelfth. In refusing to grant the fourth prayer, and stating that the ground of said refusal was that there had been no material variation of the agreement and bond by the failure to convey said two lots.

Thirteenth. In submitting the case to the jury.

Fourteenth. In sustaining the objection interposed by appellees to the question: "Did you subdivide the lots mentioned in the agreement without consulting the defendants, Wilkinson and Kemp?" propounded to the appellee, Oscar A. M. McKimmie. (Rec., p. 17.)

Fifteenth. In overruling the motion for a new trial.

Sixteenth. In overruling the motion in arrest of judgment.

Seventeenth. In refusing to rule that the personal representative of George P. Horton, Jr., was a necessary party.

Eighteenth. In refusing to rule that it is error to sue more than one and less than all the parties to an instrument the obligation of which is joint and several.

Nineteenth. In entering judgment upon the verdict.

And the Court of Appeals erred in affirming these rulings and the judgment.

Argument.

The first, sixth and ninth assignments of error relate to the right of the defendants in error to recover at all in this action upon the amended declaration and may be considered together. The first assignment of error relates to the admissibility of a sealed instrument under a declaration in assumpsit. The sixth relates to the ruling of the court that the distinction between forms of actions no longer prevails here, and the ninth relates to the refusal of the court to instruct the jury that their verdict must be for the plaintiffs in error upon the pleading and evidence in the cause. The amended declaration counts upon a bond and agreement, under seal, up to a certain point in it, and the breach of the condition thereof, and if the grievance of which the defendants in error complain had been only that; and the declaration had stopped there with the claim for $7,000.00, the penalty of the bond, unquestionably it would have sounded in debt, debt being "an action brought for the recovery of a sum certain *co nomine* and *in numero,*" but the declaration does not stop there, but proceeds to state that the principals, both obligors and the obligee (Horton) altered the terms of the sealed instrument in two respects; first by the enlargement of the time for the performance of the contract by Horton, and, second, by the mutual agreement between Horton and the defendants in error that the defendants in error might retain title to two of the lots agreed to be conveyed, without stating whether said enlargement of time and alteration of terms was by instrument under seal, or not under seal.

By this additional allegation the declaration ceased to be one in debt. It did not thus, however, become one in covenant, for *"Covenant is an action brought for the recovery of unliquidated damages for the breach of a contract under seal."*, and the contracts here set up are partly under seal and partly not under seal.

If the declaration taken as a whole sounds *in assumpsit* the bond and agreement, being under seal, were not competent or admissible thereunder.

Magruder vs. Belt, 7 Appeals, D. C., 303.
Clark vs. Harmer, 5 Appeals, D. C., 114-119.

> "A sealed instrument is not admissible in evidence in an action of *assumpsit.*"

The distinction between the various forms of action, as recognized at common law, still prevails in the District of Columbia.

Miller vs. Ambrose, 35 Appeals, D. C., 75.

> "While sec. 1 of common-law rule 26, of the lower court, providing that prolixity and unnecessary verbiage shall be avoided in all pleadings, was designed to simplify the forms of pleading and do away with unnecessary verbiage, it was not intended to abolish the common-law forms of action; and in declaring upon them it is still incumbent upon the pleader to set out the essential averments of such causes of action."

We desire briefly to call the court's attention to some of the decisions upon the question in cases arising upon contracts similar to the one now before Your Honors. We may be pardoned if we begin by a brief quotation from Poe on Pleading and the authorities there cited.

> "Recovery cannot be had in an action of covenant unless the special agreement declared on is shown to have been performed by the plaintiff according to its terms. Thus, where plaintiff covenanted to build two houses for 500 pounds by a certain day, and averred in an action of covenant for the money that the houses were built within the time, evidence that the time had

been enlarged by a subsequent parol agreement, and the houses finished within the enlarged time, did not support the declaration."

Littler vs. Holland, 3 Term. Rep., 592.
Heard vs. Wadham, 1 East, 630.
Watchman vs. Bratt, 5 G. & J., 239.
Franklin Fire Ins. Co. vs. Hamil, 5 Md., 170.

In Dermott vs. Jones, 23 Howard, 220, on appeal from the old Court in General Term, the question arose on a contract under seal, to erect improvements at the corner of Seventh Street and Pennsylvania Avenue, and the case turned entirely upon this question of pleading, and was reversed by the Supreme Court of the United States because the plaintiff had been allowed to recover upon a declaration based upon a contract under seal, the terms of which had been varied by the parties. On a second trial the plaintiff again prevailed and the case again went to the Supreme Court of the United States where it was again reversed, and the rule laid down as follows:

"Where a plaintiff has in good faith fulfilled, but not in the manner and within the time prescribed by the contract and the other party has sanctioned or accepted the work, he may recover upon the common counts in *indebitatus assumpsit*."

Dermott vs. Jones, 2 Wallace, 1.

To the same effect:

U. S. vs. Malloy, 144 Fed., 323.
O'Dea vs. Winona, 41 Minn., 429.
Lee vs. New Haven, 15 Fed. Cas., 219.
Bowen vs. Morrise, 83 N. C., 257.
Mansur vs. Botts, 80 Mo., 655.
Bibb vs. Allen, 149 U. S., 499.
North vs. Straus, 94 Md., 317, and 112 Missouri App., 189-190.

We desire to call the court's attention especially to the case of Phillips and Colby Construction Co. vs. Seymour, 91 U. S., 646 (23 Rep. Ed., p. 341). This case arose on a contract to build a railroad, and the court held that under the common law system of pleading the plaintiff cannot join the actions of covenant and assumpsit. In the statement of facts contained in the opinion of Mr. Justice Miller in that case Your Honors will observe that the trial judge attempted to cure the errors of his ruling by submitting to the jury special interrogatories to be answered by them just as the learned trial judge in the case at bar attempted to do, but, notwithstanding this, and the special finding of facts by the jury in that case the Supreme Court, speaking through Mr. Justice Miller, held itself to be bound by the common law rules of pleading. We make the following extract from the opinion in that case:

> "It seems reasonable that the claim for this extra costs should be decided in the suit in which the other compensation for the same work is recovered; that plaintiffs, having proved their case and recovered a verdict, should not be compelled to resort to a new suit in which this verdict would stand for nothing. Only a rule of pleading stands in the way, in this court, in doing what the very right of the case requires. We can give the plaintiffs the judgment for the amount of the general verdict, and reject this; or we can do complete justice, and affirm the judgment of the Circuit Court in full.
>
> "But the State of Illinois has adhered to the system of pleading which recognizes the line that separates the forms of action at common law, and the Act of Congress requires the Circuit Courts to conform to the mode of pleading of the States in which the court sits. Undoubtedly there was error under that system in admitting proof of a parol contract of this kind in an action of covenant; and as the defendant

made this precise objection, and took an exception when overruled, we do not see how we can refuse to give it the benefit of its objection. In those States where the distinctions between the forms of actions have been abolished, the declaration could have been amended and the two matters joined in the same action. In that case, we might, under the Statute of Jeofails, disregard the error, as one capable of removal by amendment below and as cured by verdict and judgment when it comes here.

"By Section 954 of the Revised Statutes which was Section 32 of the Judiciary Act of 1789 (1 Stat. L., 73), was founded on the English Statute of 32, Henry VIII, and is no broader. This Act of Congress has been frequently construed by this court in such a manner as to forbid its application to the case before us. Garland vs. Davis, 4 How., 131; Stockton vs. Bishop, 4 How., 155; Jackson vs. Ashton, 10 Pet., 480.

"There is no room here for amendment. There could have been none in the court below. To allow a verdict to stand which is responsive to no issue made by the pleadings or which could have been made by any pleading in that action, is further than we can go in the promotion of abstract justice.

"The judgment of the Circuit Court must be reversed, with directions to the court below to set aside the special verdict of the jury for the $11,708.00, and to enter a judgment in favor of the plaintiff on the general verdict of $107,353.44, with interest from the date it was rendered; and the plaintiff in error is to recover costs in this court.

"If, however, the defendant in error shall, within a reasonable time within the present term of this court, file in the circuit court a remittitur of so much of the judgment of that court in their favor as is based on the special verdict, and produce here a certified copy of the remittitur, the judgment of that court will be affirmed."

These cases, most of which were upon building contracts, will serve to show that where a contract under seal has been modified by the parties, proper action upon it is an action of *indebitatus assumpsit* on the common counts, as well as that an obligation to observe the rules of pleading and the distinctions between the various forms of actions must be noted and obeyed. Some of them will also show that even where an attempt has been made by statute to abolish these distinctions and forms and to substitute for them what is familiarly called a "plain statement of facts," the courts themselves still continue to be bound by them and will not destroy the landmarks.

Stirling vs. Garrittee, 18 Md., 468.
Miller vs. Ambrose, 35 Appeals, D. C., 75.

While Section 1532 of the Code provides for the joinder of different claims in the same action, it carefully provides that such claims must be made in separate counts, so that while at common law you could not join the different forms of actions in the same suit, now, under the Code, you may join them in the same suit, provided you separate them into different counts, but cannot join two forms of actions in the same count. This shows that the Code itself recognizes the fact that the distinction between the various forms of action still exists in the District of Columbia, and the case of Miller vs. Ambrose, *supra*, shows that the courts observe the distinction in the construction of its own rules.

The fourth, fifth, seventh, eighth and twelfth assignments of error may be considered together as they all relate to the action of the court in ruling that the failure by the defendants in error to convey the two lots was not such a material variation of the contract as to discharge the plaintiffs in error as sureties. For two reasons the lower court was in error in so holding.

First. In the same action between the same parties the identical question had been determined by Mr. Chief Justice Clabaugh when he sustained the demurrer to the original declaration. This question has been sufficiently enlarged upon in the statement of the case where the authorities are cited and reviewed.

Second. But, in point of fact and of law, the variation of the terms of the contract was a material variation. Here was a builder buying property upon which to erect improvements and, as part of the consideration for his purchase, he was to build houses on two of the lots conveyed and hand the completed houses back to the owners free of encumbrances. Here are two friends who become sureties for the faithful performance of this contract by the builder. Is it to be said that it was not of material consequence to the builder that he should have title to the property upon which he was about to build? His title to the property in all probability was the basis, and the only basis, upon which he could obtain material and labor, or credit for material and labor to be laid out in the consummation of the contract itself. The fact that he was to have the title may have been the inducement to his two friends, the plaintiffs in error, to become his sureties. The whole subject has been recently reviewed by this court in an exhaustive opinion by Mr. Justice Shiras in the case of U. S. vs. Freel, 186 U. S., 309 (46 L. Ed., 1177).

An additional word here as to the eighth assignment, which may also be taken in connection with the thirteenth assignment, which is that the court erred in submitting the case to the jury. There was no evidence legally sufficient to show that the plaintiffs in error ever assented to the alleged arrangement between Horton and the defendants in error that the latter should retain title to these two lots. The two papers (Rec., pp. 14 and 15), known

at the trial of this case as the extension papers, were nothing more than papers intending to extend the time within which Horton, the principal obligor, was to have to complete his contract. Neither of these papers refer to the fact that the terms and conditions of the contract itself had been altered and varied, and that no conveyance was to be made or had been made by the McKimmies to Horton of the two lots upon which the houses were to be built. The letter from Ambrose to the plaintiffs in error, and which is reproduced in the opinion of the Court of Appeals (Rec., p. 31), makes no reference to such a condition of affairs, but rests the claim of the plaintiffs in error solely upon the fact that they were bound by the terms and conditions of the bond sued on and the extensions of the time for the performance of the contract by Horton, the principal obligor, and makes no reference to any new arrangement between Horton and the plaintiffs in error other than for the extension of time. The only evidence on that subject at all is that, some time after Horton had entirely abandoned his work under the contract and had become hopelessly insolvent, at a meeting of his creditors, called by William E. Ambrose, and held at his office, "everybody seemed to think it was lucky that the two lots had not been conveyed." The plaintiffs in error say they never heard of such an arrangement or of said alleged language at the meeting at Ambrose's office, and knew nothing of it until their attention was called to it, when the original declaration was handed to the writers of this brief; and the original declaration did not contain such an allegation; and such allegation never was made, until after Chief Justice Clabaugh had determined that the variation of the terms of the contract was material and released the plaintiffs in error.

The lower court's action, as set forth in the twelfth assignment of error, in refusing to grant plaintiffs' in error fourth prayer, on the ground that the variation of the terms of the contract was immaterial, was also erroneous for the reasons above stated.

As to the tenth error assigned, being the refusal to grant the defendants' second prayer (Rec., p. 21), there was no evidence in the case that the plaintiffs had any title, good, or bad, to the property conveyed. They agreed to convey lots 27, 28, 29 and 30, in block 9, of Todd and Brown subdivision of Mount Pleasant and Pleasant Plains (Rec., p. 12), and they put in evidence (Rec., p. 20) a deed from themselves to George P. Horton, Jr., of lots 39 and 52, both inclusive, and 55 and 56 in Oscar A. M. McKimmie and others, subdivision of lot No. 9, of Todd and Brown subdivision of Mount Pleasant and Pleasant Plains. That is all the evidence on the subject, and there is nothing to show that the property mentioned in the deed is the same property mentioned in the agreement. Nor was there any evidence that anybody ever authorized the subdivision of the property agreed to be conveyed; and, therefore, it is submitted that it was also error to refuse the defendants' third prayer (Rec., p. 22), being the eleventh assignment of error.

The second and third assignment of error will now be considered. It is submitted that there was no evidence that either Kemp or Wilkinson ever signed these papers, both swore that they did not, and no man contradicted them. The papers purported to have been signed before one George E. Terry, a notary public. He was not produced as a witness nor was his absence accounted for. Even conceding that papers of this character do not require a witness, when a subscribing witness actually does attest a paper, the unvarying rule of evidence is that he

must be produced or his absence accounted for and his signature proved. The notarial seal does not import verity nor does the court take judicial notice of it, when affixed to instruments other than those to which it is customary, usual or necessary to affix it. 1 Greenleaf on Evidence, notes to sections 1 and 2, 29 Cyclopedia of Law and Procedure, 1094.

There is one other assignment of error for matters occurring prior to or during the trial, to wit: the fourteenth. The plaintiff, Oscar McKimmie, was asked (Rec., p. 17) by attorney for plaintiffs in error: "Did you subdivide the lots mentioned in the agreement between you and Horton without consulting Kemp and Wilkinson?" and, upon objection by defendants' in error attorney, the court refused to permit the question to be put. It is submitted that this is reversible error. There is not the least allusion, in the agreement or bond, to any subdivision of the property agreed to be conveyed by the defendants in error to Horton. There is an agreement on his part to reconvey two lots on Brightwood Avenue, with a house on each, 16 feet 8 inches front, free and discharged from any lien or incumbrances. But there is nothing in the agreement or the bond or the extension papers, or in any writing in the evidence in the case to show that the defendants in error were to subdivide "lots 27, 28, 29 and 30 in block 9, of Todd and Brown subdivision" or that anything was to be conveyed by them to Horton except those lots, and, it is submitted, that the question was pertinent and that the court should have allowed it to be put and answered. The court's action in overruling the motion for a new trial is not usually subject to review, but it seems to us that the present case is one in which there was absolutely no evidence to go to the jury, and it was error of law, reviewable in this court, to deny that motion. As to the

motion in arrest of judgment, it is submitted that no judgment could be entered in this case against the two plaintiffs in error without having the personal representative of the remaining joint and several obligor made a party to the Record. Merrick vs. Bank of Metropolis, 8 Gill., 64. In the case of White vs. Connecticut General Mutual Ins. Co., 34 App. D. C., 460, it was recently decided that it was proper to join the personal representative of one of several joint and several obligors in an action with the others. It would not have been error to have made such personal representative a party defendant on the Record in this case, and we submit, that it was error not to have made the personal representative a party, and, that, for this reason also, the judgment should have been arrested.

It would seem that the point attempted to be raised by this motion in arrest of judgment was not appreciated by the Court of Appeals at all for, in its opinion (Rec., p. 35), in considering this motion, it uses the following language:

> "That the action was discontinued as to Horton, who it seems had become insolvent, presents no ground for arresting the judgment. Section 1211 of the Code simply provides that one action may be sustained and judgment recovered against all or any joint and several obligors. It does not require that this shall be done."

The point sought to be urged was that Horton being dead it was necessary to make his personal representative a party to the record and not to discontinue the case against him and proceed alone against the surviving joint and several obligors, or, as the motion has it, against more than one and less than all.

It is therefore respectfully submitted that the judgment of the lower court should be reversed.

CHARLES POE,
ALFRED D. SMITH,
Attorneys for Plaintiffs in Error.

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CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 273.

OSCAR WILKINSON AND THOMAS J. KEMP, PLAINTIFFS IN ERROR,

vs.

OSCAR A. M. McKIMMIE AND SIMON McKIMMIE.

BRIEF FOR DEFENDANTS IN ERROR.

W. E. AMBROSE,
JOHN RIDOUT,
Attorneys for Defendants in Error.

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BRIEF FOR DEFENDANTS IN ERROR.

The attention of the court is called to the omission of an assignment of errors in the record, and it is submitted that this omission is not supplied by the belated assignment attempted in the brief. Because of this omission no question is adequately presented for review. Without waiving this contention the points made in the opposing brief will be considered. The objections sought to be raised are: That the form of the declaration was inappropriate and insufficient; that a ruling on a demurrer by one judge so dominates the case in its subsequent stages as that it is error for an appellate court to overrule it; that the evidence was insufficient to support the verdict; that the charge of the court erroneously

stated the law to the jury; that the omission to revive the case as against the personal representative of a deceased party to the contracts, which were joint and several, was error because of which judgment should have been arrested.

The Declaration.

The criticism of the declaration is of the utmost technicality. Reversals for such technical grounds have long been subject to condemnation by this court and in many instances have been denied. The declaration in this case is in covenant, and the instruments relied on, including the extension contracts, are all under seal.

Rule 27 of the trial court reads as follows:

> "The declaration shall state only the facts necessary to constitute the cause of action."

The court below sustained the declaration in so clear a statement as to render further comment than reference to its opinion unnecessary.

The ultimate test of a declaration under the present enlightened views of this court is: Does it fully acquaint the defendant with the case he is to meet? Surely the declaration herein does this. No demurrer to the amended declaration was filed.

The cases cited by plaintiffs in error all had to do with very different situations as to pleadings and proof, as will appear from the examination of them which this court will make.

But the declaration is sufficient in substance, even if subject to verbal criticism, as appears by frequent utterances of this court. The case of Dermott *vs.* Jones, cited by plaintiffs in error, is inapplicable. That was the converse of this proceeding, that being an action by Jones, the builder, to recover on an unperformed contract.

The true attitude of this court on the subject is shown in the views expressed in Standard Oil Company *vs.* Brown, 218 U. S., 78, and in the very recent case decided April 7, 1913, No. 176 of this term, of McCloskey *vs.* George A. Fuller Co. The motion in arrest may properly be dealt with here. Section 1209 of the District of Columbia Code provides as follows:

> "In actions *ex contractu* against alleged joint debtors it shall not be necessary for the plaintiff to prove their joint liability, as alleged, in order to maintain his action, but he shall be entitled to recover as in actions *ex delicto* against such of the defendants as shall be shown by the evidence to be jointly indebted to him or against one only if he alone is shown to be indebted to him, and judgment shall be rendered as if the others had not been joined in the suit."

And section 1211 as follows:

> "Where money is payable by two or more persons jointly or severally upon the same obligation or instrument one action may be sustained and judgment recovered against all or *any* of the parties by whom the money is payable at the option of the plaintiff, but if separate actions be brought unnecessarily against the several parties to such contract the said actions may on motion be consolidated and the plaintiff shall be allowed the costs of one action only."

These provisions would seem to have been framed expressly to meet the objection to the declaration and completely answer it. Besides, the declaration being complete on its face, the question cannot be raised by motion in arrest, and, finally, no exception was reserved to the ruling, thus waiving the objection.

Smith *vs.* Ross, 31 Appeals D. C., 352.

Taken as a whole, it is a declaration in covenant.

The citations of authorities in appellants' brief are all

based upon declarations clearly and unmistakably in assumpsit, of which Magruder *vs.* Belt, 7 Appeals, 303, is an illustration.

The fourth, fifth, seventh, eighth, and twelfth assignments of error are not well founded for the reasons that the effect of the ruling of Mr. Chief Justice Alabaugh on the demurrer had been completely met and overcome by the amended declaration.

Under the action of the jury it is really of no importance whether the variation in the terms of the contract was material or not, for the jury expressly found that with knowledge of such variation the defendants had signed what are known in the case as the "extensions," thereby ratifying and approving, with full knowledge, the action which had been taken.

The jury had before them both of the defendants, and those defendants had the benefit of eminent counsel's advice and knew how important it was to deny execution of the extension papers, and yet the court will observe how utterly they both failed to deny the execution of the papers, and their knowledge on the subject, not only of the extensions, but of the fact that the lots had not been conveyed, was corroborated by the testimony of Oscar A. M. McKimmie, Haller, and the letter of Mr. Ambrose, taken in connection with the silence of the defendants in the presence of the Ambrose letter.

Another most significant circumstance is that the defendants attended the meeting at Mr. Ambrose's office, which they would not have attended, accompanied as they were by Mr. Poe, had they not known that they were liable under the paper they had signed, together with the knowledge they had. And the jury from this circumstance alone would have been justified in finding as they did.

It further appears from the bill of exceptions (Rec., p. 26) that, at the suggestion of counsel for appellants, the

jury took to their room for comparison the bond, agreement, and the extension papers.

Upon examination of the contract between Horton and the McKimmies it will appear that the plaintiffs were not bound to show as a condition of recovery anything concerning the state of the title to the property referred to in the agreement, any question arising in respect to such title being a matter of defense if material at all.

It is respectfully submitted that it is not a rule of evidence that the only method of proving the execution of a document is by the testimony of the attesting witnesses. Such is the requirement only when the parties to the paper who are sought to be charged by it are not called as witnesses.

Ordinarily they are not so called, and then, of course, the presumably disinterested attesting witness can furnish the most reliable evidence of the execution.

But in this case the jury had the benefit of seeing and hearing the defendants testify and of observing that neither of them was willing to deny the execution of the papers, and the jury were no doubt greatly influenced, as they well might be, not only by the lack of denial of execution, but by the fact that Wilkinson practically admitted in terms the execution of the paper of July 27, 1906 (Rec., 19), and Kemp that of November 27, 1906 (Rec., 18).

It is difficult to see the materiality of the question of subdivision or not. It is apparent that the subdivision consisted merely of drawing lines at such distances apart as would produce lots of the appropriate size and frontage to correspond with the houses which were to be built, so that the question was wholly immaterial and the objection thereto was properly sustained.

The criticisms contained in the appellants' brief are, it is submitted, fully met and disposed of by the charge of the court, which is contained in the record and which shows that the case was submitted to the jury with absolute fairness to the defendants, and as appears by the record the jury found

every issue in favor of the plaintiffs, as especially appears by their answers to the questions submitted to them, a practice approved both by this court and the Supreme Court of the United States.

None of the assignments of error attempted to be based on insufficiency of evidence is maintainable here, because no exceptions on that ground were saved; on the contrary, learned counsel carefully stated what his grounds for the instructions were, and he himself saw to it that the disputed writings were taken to the jury-room and that inspection alone would have sustained the verdict. Nor did said counsel except to the charge of the court on any ground except that of the definition of rental value. It follows that no question of any importance arising upon the charge is here.

The cases cited, so far as in this court, will be found to be entirely inapplicable. This is notably true of Phillips *vs.* Construction Co., 91 U. S., 646. In that case an attempt was made to recover in covenant on a contract under seal and also, in the same declaration, to recover on a *quantum meruit* for extra work. The recovery on the covenant was sustained. In this case no such recovery is sought. This is not a suit by one who has performed his contract; *it is a suit for damages for non-performance* and, as so well stated in the opinion of the Court of Appeals, the defense foreshadowed in the demurrer to the original declaration is simply met in the amended declaration.

This vice appears in all the argument on the other side, which proceeds upon a theory applicable to a case where *the builder is suing;* not at all to a case where damages in covenant are sought for *a breach of a covenant under seal,* the "extensions" being simply relied on to negative release of the sureties by change of contract.

And the same is true of the State cases and Mr. Poe's book, which, even if apposite, could only be persuasive and could afford no ground to change the wise and just attitude which has been assumed by this court in its decisions in respect of such questions.

The opinion of the Court of Appeals, which is in the record, so fully meets and answers all the contentions of the plaintiffs in error that further discussion is deemed unnecessary. It is accordingly submitted that the judgment below was right and should be affirmed.

W. E. AMBROSE,
JOHN RIDOUT,
Attorneys for Defendants in Error.

WILKINSON *v.* McKIMMIE.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 273. Argued May 1, 1913.—Decided June 9, 1913.

A court of equity looks to substance rather than to form. Whether the contract of the principal has been so altered as to discharge the surety is to be decided according to the essentials.

In this case *held* that an arrangement as to a reservation in a convey-

ance made simply to save expense of reconveyance and which did not alter the position of the principal or his surety was not such a material change as would discharge the surety.
36 App. D. C. 336, affirmed.

THE facts, which involve questions of liability of sureties on a bond and what constitutes a variation of contract sufficient to release them, are stated in the opinion.

Mr. Charles Poe and *Mr. Alfred D. Smith* for plaintiffs in error.

Mr. John Ridout, with whom *Mr. Wm. E. Ambrose* was on the brief, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

By the judgment here under review the Court of Appeals affirmed a judgment in favor of the Messrs. McKimmie against Wilkinson and Kemp in an action upon a bond they had signed as sureties for one Horton. By an agreement in writing, the McKimmies agreed with Horton to convey to him four lots in Block 9 of Todd and Brown's subdivision of Mount Pleasant and Pleasant Plains for $11,500, which he agreed to take and pay for as follows: To assume a mortgage of $3,000 and pay $1,000 on delivery of the deed; to reconvey to the Messrs. McKimmie two lots, each 16 feet 8 inches front on Brightwood Avenue (part of the land above described), free and clear of encumbrances, and erect on each of these lots a two-story brick dwelling, according to approved plans and specifications, within eight months from the date of the agreement, for which construction and completion, clear of mechanics' liens or other encumbrances, Horton agreed to furnish a sufficient and satisfactory bond to the McKimmies; and for the balance of the purchase price, $500, Horton was

to give two notes, secured by a second deed of trust upon two other lots in the tract, "upon which he is to erect houses similar to those herein described." The agreement expressly provided that "The said houses contracted for to be constructed as aforesaid shall be delivered upon their completion to the parties of the first part [the Messrs. McKimmie] as their property in fee simple and shall be free and clear of all encumbrances or liens."

The bond in suit recited the agreement, and was conditioned for its faithful performance by Horton.

The opinion of the Court of Appeals (36 App. D. C. 336) sets forth the full history of the controversy and the course of the trial. We deem it necessary to mention only one of several matters that were discussed in argument before us, and that is, the contention that the plaintiffs in error were discharged from responsibility as sureties because of the fact that by arrangement made between the Messrs. McKimmie and Horton, instead of their conveying to him the two lots that were to be theirs in the outcome, and upon which he was to build the houses that were to become their property, they had, with his consent, reserved these two lots from the conveyance.

We agree with the Court of Appeals that while in form the contract required the plaintiffs to convey the whole of the land to Horton, who was to erect certain houses upon the two lots and reconvey them to the plaintiffs free and clear of encumbrances, the real purpose and effect of the agreement was that Horton was to have title to the remainder of the land in consideration of his erecting these two houses for the plaintiffs; and that, notwithstanding the form of the contract, its essence was such that if the McKimmies had conveyed the whole plot to Horton they would nevertheless have remained in equity the owners of the two lots. For a court of equity looks to substance rather than to form.

It is hardly necessary to say that the question whether

the contract of the principal has been altered so as to discharge the surety, is to be decided according to the essentials, in whatever jurisdiction it may be raised. And so we think the court correctly held that the arrangement that was made between the McKimmies and Horton, of reserving the two lots from the conveyance in order to save the expense of a reconveyance, was not a material change in the contract; that it did not alter the position of either Horton or his sureties, and therefore did not discharge the latter. *Read* v. *Bowman*, 2 Wall. 591, 603; *Reese* v. *United States*, 9 Wall. 13, 21; *Cross* v. *Allen*, 141 U. S. 528, 537.

Judgment affirmed.